

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-2466

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSE BORRELLO,

Plaintiff-Appellee,

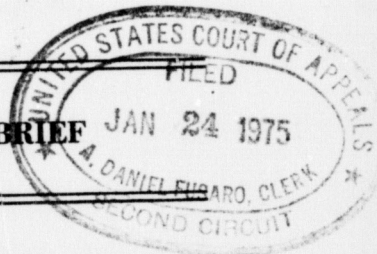
—against—

PERRERA COMPANY, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF



GREENWALD, KOVNER & GOLDSMITH

Attorneys for Defendant-Appellant

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Docket Entries

DATE	PROCEEDINGS
Dec 21-72	Filed Complaint. Issued Summons.
Jan 3-73	Filed ANSWER OF DEFT to the complaint.
Jan 3-73	Filed summons with marshals return. SERVED: PERERA COMPANY, INC. 12-26-72
Sept 11-73	Filed Amended ANSWER to complaint.
Sept 5-73	Case Reassigned to LEVET, J.
Jul 15-74	Filed pltff's proposed findings of fact & conclusions of law.
Jul 15-74	Filed pltff's post-trial memorandum.
Jul 26-74	Filed pltff's post-trial reply memorandum.
Jun 14-74	Before Levet, J. Non-Jury trial begun & concluded. Dec. Res.
Sep 23-74	Filed OPINION, Findings of fact & conclusion of law. #41204:, Deft. has failed to prove by a fair preponderance of the credible, evidence that pltff. should be estopped from recovering his funds, Pltff. is entitled to judgment against deft. Perera for \$20-000, plus interest from Sept. 23, 1971, according to law, together with, costs. Settle judgment promptly upon notice pursuant hereto. Levet, J. m/n
Sep 25-74	Filed transcript of record of proceedings dated 6-14-74.

Docket Entries

DATE	PROCEEDINGS
Oct 4-74	Filed JUDGMENT #74,791: Ordered that plttf. recover of deft the sum of \$23,629.57 together with plttf's costs as taxed by the clerk & plttf. have execution therefor. Levett, J. Judgment Ent. Clerk. Ent. 10-8-74. Mailed notice.
Oct 15-74	Filed Bill of costs as taxed in the amount of \$208.76, in favor of plttf, & added to the judgment #74,791. Clerk.
Nov 4-74	Filed Deft's Notice of Appeal to the USCA from final judgment entered on 10-7-74. Mailed copy to Frank & Fredericks.
11-26-74	Filed Stipulation designating which papers are to be transmitted to USCA.
11-26-74	Filed Designation of Exhibits to be transmitted to USCA.

A True Copy

RAYMOND F. BURGHARDT,
Clerk.

A. E. THOMPSON,
Deputy Clerk.

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, by his attorneys, Frank and Fredericks, for his complaint, alleges:

1. Plaintiff is a citizen of the Republic of Argentina, residing in the City of Buenos Aires, Argentina.
2. Upon information and belief, defendant is a corporation duly organized and existing pursuant to the laws of the State of New York, with its main place of business located in New York County, within the State of New York and the Southern District of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.
3. Jurisdiction of this Court derives from the diversity of citizenship of the parties and from the fact that the amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand (\$10,000.00) Dollars.
4. Upon information and belief, defendant is engaged in the business of providing banking services and foreign currency and exchange services.
5. On or about September 20, 1971 plaintiff drew his check number 72 on his account at First National City Bank, New York, New York, in the amount of \$10,000.00, to the order of defendant.

Complaint

6. On or about September 20, 1971 plaintiff drew his check number 73 on his account at First National City Bank, New York, New York, in the amount of \$10,000.00, to the order of defendant.

7. On or about September 20, 1971 plaintiff delivered the above mentioned two checks totalling \$20,000.00 to the brokerage firm of Warroquiers, S.A. in Buenos Aires, Argentina, with instructions to deposit the funds with defendant for the account of plaintiff pending instructions to defendant to pay out the funds in connection with the contemplated purchase by plaintiff of Argentine Government External Bonds available for purchase in the United States.

8. Upon information and belief, defendant received and accepted the aforementioned checks on or about September 23, 1971 and, instead of placing them to the personal credit of plaintiff, placed them to the personal credit and account of Marfinco S.A., and collected the same and thereafter applied the proceeds thereof in payment of an indebtedness of Marfinco S.A. to defendant for the benefit of itself and Marfinco S.A. and thereby misappropriated the proceeds of said checks to its own personal use without authority.

9. By reason of the form of the abovementioned checks, defendant had notice that said checks and the proceeds thereof were the property of the plaintiff and with said notice putting it upon inquiry, which it failed to make and which would have disclosed the fact of plaintiff's ownership of the checks and the proceeds, defendant nevertheless improperly paid and appropriated the proceeds of said checks to its own personal use and benefit.

Complaint

10. The firm of Marfinco S.A. was and is unknown to plaintiff and plaintiff did not authorize or have knowledge of the placing of the typed legend "For deposit only—Pay to the credit of Marfinco S.A." on the back of the aforementioned checks and did not authorize the placing of the checks to the personal credit of Marfinco S.A. and the application of the proceeds of said checks to the private indebtedness of Marfinco S.A. to defendant.

11. Heretofore and prior to the commencement of this action, plaintiff duly demanded in writing the payment to him of the sum of \$20,000.00, but the defendant has failed and refused to comply with such demand, and refuses to return the said sum to plaintiff.

12. By reason of the foregoing, defendant is indebted to the plaintiff in the amount of \$20,000.00, no part of which has been paid although duly demanded.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of \$20,000.00, with interest from September 23, 1971, together with the costs and disbursements of this action.

Dated: December 21, 1972.

FRANK and FREDERICKS

By FRANK O. FREDERICKS

Frank O. Fredericks,

a member of the firm

Attorneys for Plaintiff

41 East 42nd Street

New York, New York 10017

(212) MU 2-0767

Amended Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5368 R.H.L.

[SAME TITLE]

Defendant, by Greenwald, Kovner & Goldsmith, its attorneys, for its amended answer to the complaint, alleges:

1. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 1.
2. Admits the allegations contained in paragraph 2.
3. Admits that the amount in controversy exceeds \$10,000.00 exclusive of interest and costs but denies knowledge or information sufficient to form a belief as to the residence of plaintiff as alleged in paragraph 3.
4. Admits that defendant is engaged in the business of providing foreign currency and exchange services and denies that defendant is engaged in the business of providing banking services as alleged in paragraph 4.
5. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 5.

Amended Answer

6. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 6.

7. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 7.

8. Admits that defendant received the checks referred to in paragraphs 5 and 6 of the complaint and further admits that the proceeds thereof were credited to the account of Marfino S.A. and, except as so admitted denies each and every allegation contained in paragraph 8.

9. Denies each and every allegation contained in paragraph 9.

10. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 10.

11. Admits the allegations contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12.

As and for a First Defense

13. That the complaint fails to state a claim upon which relief can be granted.

*Amended Answer**As and for a Second Defense*

14. That any loss caused to the plaintiff by reason of the allegations contained in the complaint were proximately caused by the contributory negligence of the plaintiff.

As and for a Third Defense

15. That if the loss alleged in the complaint must fall upon one of two innocent parties, it should fall upon the plaintiff whose acts made the loss possible.

As and for a Fourth Defense

16. That upon receipt of the checks referred to in the complaint, the defendant innocently and in good faith applied the proceeds thereof in accordance with instructions contained on the reverse side of the checks.

17. That although the defendant's customer, Marfinco S.A., had a substantial credit balance at the time of the crediting of the proceeds of such checks to the account of Marfinco S.A., that said Marfinco S.A. thereafter used the credits in its account and that there was a debit balance in the account at the time when defendant received notice from the plaintiff of his claim and such debit balance has continued to this time.

18. That if the plaintiff issued his checks to the order of the defendant without giving any instructions to the defendant and relied upon others to do so, who may have

Amended Answer

practiced an imposition upon the plaintiff while defendant innocently relied upon the instructions it received, that the plaintiff is and ought to be estopped from asserting any claims against defendant based upon the allegations contained in the complaint.

As and for a Fifth Defense

19. Upon information and belief, that plaintiff illegally maintained a checking account in dollars at First National City Bank in Manhattan in violation of the laws of Argentina, of which plaintiff is a resident.

20. Upon information and belief, that plaintiff attempted, in violation of the laws of Argentina, to purchase Argentine government external dollar bonds through the use of dollar funds illegally maintained by the plaintiff in New York City.

21. That the transaction upon which this suit is based is tainted with illegality throughout, which disentitled the plaintiff to relief.

As and for a Sixth Defense

22. That on or about October 7, 1971 First National City Bank, at which plaintiff then maintained his account, rendered and sent to plaintiff a statement of account and cancelled checks covering activity in the plaintiff's account from September 9, 1971 to October 7, 1971.

Amended Answer

23. That said statement of account and cancelled checks were duly received by the plaintiff from First National City Bank in or about the month of October, 1971.

24. That the cancelled checks which are the subject of this suit bore a typewritten legend reading

“For deposit only—Pay to the credit of Marfinco S.A.”,

which said legend put the plaintiff on notice that the proceeds of the aforesaid checks had been credited to the account of a company other than the company intended by the plaintiff to receive them.

25. That at the time of the receipt of said statement and checks, Marfinco S.A. had a very substantial balance with defendant and that for a long time thereafter it continued to maintain with the defendant balances well in excess of \$20,000.00.

26. That the plaintiff gave no notice to defendant of a possible imposition upon him until March 30, 1972 at which time plaintiff addressed a letter to the defendant.

27. That at the time of the receipt of the aforesaid letter by the defendant, Marfinco S.A. had withdrawn all of its funds from the defendant and was insolvent and defunct.

28. That had the plaintiff taken timely action in notifying the defendant promptly upon receipt of the aforesaid bank statement and cancelled checks in or about October, 1971, defendant was in position to make the plaintiff whole by blocking a sum sufficient to repay the plaintiff.

11a

Amended Answer

WHEREFORE defendant demands judgment dismissing the complaint, with costs.

GREENWALD, KOVNER & GOLDSMITH
Attorneys for Defendant

By HARRY LITWIN
a member of the firm
521 Fifth Avenue
New York, New York 10017
212/687-6600

Transcript of Proceedings

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before :

RICHARD H. LEVET,

District Judge.

June 14, 1974—10:00 a.m.

Appearances :

FRANK & FREDERICKS, Esqs.,
Attorneys for Plaintiff,
41 East 42nd Street,
New York, New York

By: MIGDAL, TENNEY, GLASS & POLLACK, Esqs.,
598 Madison Avenue,
New York, New York

By: LAWRENCE W. POLLACK, Esq., *of Counsel*

GREENWOLD, KOVNER & GOLDSMITH, Esqs.,
Attorneys for Defendant,
521 Fifth Avenue,
New York, New York

By: HARRY LITWIN, Esq., *of Counsel*

Colloquy

[2] (Hearing in Chambers.)

The Court: I have read your respective trial memoranda. I don't think any opening statements are necessary.

Insofar as the law is concerned, I shall reserve all motions to dismiss, Mr. Litwin, until I have gotten the facts. I think I should in justice to each of you.

Mr. Litwin: Yes, of course.

The Court: After that's been done I will request you to do something about post trial papers. I don't know whether you received a statement as to what is ordinarily required.

Mr. Litwin: Your mimeograph of findings and conclusions, your Honor?

The Court: Yes.

Mr. Litwin: You gave us that months ago. We have it.

The Court: All right.

Mr. Pollack, what is first,

Mr. Pollack: I just want to make a translation change.

(Pause.)

The Court: What's first, Mr. Pollack?

[3] Mr. Pollack: If your Honor please, first we have a few stipulations.

I understand the defendant is stipulating to withdraw the fifth affirmative defense alleged.

The Court: Put that on the record. It is stipulated by the defendant that the fifth affirmative defense is withdrawn; is that correct?

Mr. Litwin: It is correct, your Honor.

The Court: You don't object to that?

Mr. Pollack: No, your Honor.

The Court: All right.

Colloquy

Mr. Pollack: It is also stipulated between counsel that the defendant Perera Company, Inc., is a New York corporation organized under the Business Corporation Law of the State of New York.

Mr. Litwin: Organized under the Stock Corporation Law, now the Business Corporation Law.

The Court: What are the purposes? Do you have a copy of the Certification of Incorporation?

Mr. Litwin: The purposes are to deal in foreign currency. It's a foreign currency house.

The Court: Is that all?

Mr. Litwin: Coins.

The Court: Stocks?

[4] Mr. Litwin: No.

The Court: All right.

Mr. Pollack: Maybe I will bring that out with a witness.

The Court: All right. You will elicit that.

Mr. Pollack: If your Honor please, I would like to offer as Plaintiff's Exhibit 1—

The Court: How many exhibits are there? Just estimate.

Mr. Pollack: It depends if we mark them in bunches or not.

The Court: What I am suggesting, if it is suitable, have them marked by the clerk for identification all at once now.

(Plaintiff's Exhibit 1 marked for identification.)

Mr. Litwin: Is this the whole set, direct, cross and re-direct?

Mr. Pollack: Yes.

The Court: What is this, a number of exhibits? Is it one or a number?

Colloquy

Mr. Litwin: It's written interrogatories, your Honor, direct, cross and redirect.

The Court: Why do we need this if we have the [5] deposition?

Mr. Pollack: This is the deposition.

Mr. Litwin: This is the answer to interrogatories.

Mr. Pollack: This is the deposition.

The Court: Both sides are content to have the whole thing go in?

Mr. Pollack: Yes.

Mr. Litwin: I have no objection to this going into evidence, your Honor. I may have objections to specific questions or specific answers.

The Court: Then we have to do it the long, laborious way of my passing on each question to which you object.

Mr. Litwin: If I could hold that for the post trial brief.

The Court: No, I'm not going to hold it for the post trial brief. I have to get a record here. I insist on it being correct this time.

You do what you want, all, or we have to do it the long, laborious way, as I said.

Mr. Pollack: I am prepared to offer it all, including your cross examination.

Mr. Litwin: Your Honor—

The Court: I told you the alternatives. Which do [6] you want to do?

Mr. Litwin: I must respectfully object to all testimony by the plaintiff of his conversations with a third party.

The Court: I don't know what these are. I will have to do it the long way. I have no alternative.

Proceed, counselor. Do you want to read certain parts?

Colloquy

Mr. Pollack: Yes, your Honor.

The Court: Do you have a copy of this?

Mr. Pollack: Yes. What I'm going to do, your Honor, is also ask to be marked for identification the combined set of questions and answers in English which I had prepared from the deposition for identification.

The Court: Why should I take that, counselor? You have the questions in English, you have the answers in English on this other document.

Mr. Pollack: It's very hard to follow, your Honor.

The Court: Why is it hard to follow?

Mr. Pollack: Because the answers are on a separate document than the questions.

The Court: You should have had both together and in English and an agreement on the translation. [7] It's ten minutes after ten, and frankly neither one of you are ready.

Mr. Pollack: We do have all of that, your Honor.

The Court: Why do you want this other thing in then?

Mr. Pollack: That is the set that is together, that has the questions and answers together in English.

The Court: I know, but counsel objects to some of the deposition questions.

Mr. Pollack: We'll go over that.

The Court: We'll have to go over it. Wait a minute. It's marked for identification. It's not in evidence.

Mr. Pollack: Right.

The Court: You proceed and start to read.

Mr. Pollack: Can I mark this document for identification, please.

(Plaintiff's Exhibit 2 marked for identification.)

Colloquy

The Court: Read anything at least to which there is no objection.

Will you please make a checkmark if you read it so when I get it I will know what has gone in.

[8] In other words, what I am trying to do here for you is to avoid the necessity of making up a transcript. The reporter might not like that or maybe he does.

Mr. Pollack: I appreciate that. I wasn't aware that there were any objections.

The Court: Apparently it's a surprise.

Mr. Litwin: I don't want to cause my friend any difficulty—

The Court: Go ahead.

Mr. Pollack: —or cause delay, your Honor. I think we might get along with your Honor's approval if the whole deposition went in and we could then make motions, post-trial motions.

The Court: No, I am not going to have post-trial motions. That has to be decided as we go along. I am not going to do it that way.

Read the first question you want to put in. I don't have any copy.

Mr. Litwin: Your Honor, I will consent.

The Court: It all goes in?

Mr. Litwin: Yes.

The Court: It's consented that the entire deposition be marked in evidence. The clerk will mark it as Plaintiff's Exhibit 1.

[9] (Plaintiff's Exhibit 1 received in evidence.)

Mr. Pollack: I would like to offer in evidence with the consent of my opponent Plaintiff's Exhibit 2, which is a

Colloquy

copy of Plaintiff's Exhibit 1 put into form so that it's workable for the Court.

Mr. Litwin: Consented to, your Honor.

The Court: All right. Mark it.

(Plaintiff's Exhibit 2 received in evidence.)

The Court: You can post trial, each one of you, refer to any portion of the deposition, page so and so, line so and so as supporting the proposition which you wish me to find as to the facts.

Mr. Pollack: If your Honor please, I would like to point out to the Court that there are a number of exhibits attached to the deposition—

The Court: They are not in evidence before me unless they are newly marked. So offer them. Get them marked for identification and offer them. They will be given a number in this trial.

(Discussion off the record.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 3 taken with no objection the check dated December 20th—

The Court: Wait a minute, counselor. Is it [10] marked in the deposition?

Mr. Pollack: Yes, it is.

The Court: Give that number.

Mr. Pollack: Marked as Exhibit A in the deposition which is Plaintiff's Exhibit 1.

Mr. Litwin: No objection.

(Plaintiff's Exhibit 3 received in evidence.)

Colloquy

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 4 the check marked as Exhibit B to the deposition which is Plaintiff's Exhibit 1.

Mr. Litwin: No objection.

(Plaintiff's Exhibit 4 received in evidence.)

Mr. Pollack: I would like to offer into evidence the document marked as Exhibit C to the deposition which is Plaintiff's Exhibit 1.

Mr. Litwin: No objection.

(Plaintiff's Exhibit 5 received in evidence.)

Mr. Pollack: I would like to offer as plaintiff's next exhibit, I suggest to be marked as Plaintiff's Exhibit 5a, which is the agreed upon English translation of Exhibit 5.

The Court: That is not only proper but it's necessary.

Mr. Litwin: Consented to.

[11] The Court: You agree that that translation is correct?

Mr. Litwin: Yes, sir.

The Court: All right.

(Plaintiff's Exhibit 5a received in evidence.)

Mr. Pollack: I would like to offer as the next plaintiff's exhibit the document marked in the deposition of Plaintiff's Exhibit 1 as E-1.

Mr. Litwin: No objection.

(Plaintiff's Exhibit 6 received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 6a an agreed upon English translation.

The Court: Very well.

Colloquy

Look at it.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 6a received in evidence.)

Mr. Pollack: I would like to offer as the next plaintiff's exhibit the document attached to Plaintiff's Exhibit 1 and marked as Exhibit E-2 in that deposition.

Mr. Litwin: No objection, your Honor.

(Plaintiff's Exhibit 7 received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 7a the agreed upon English translation.

Mr. Litwin: Consented to.

[12] (Plaintiff's Exhibit 7a received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 8 the document attached to Plaintiff's Exhibit 1 and marked as E-3 in that deposition.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 8 received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 8a an agreed upon English translation of Exhibit 8.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 8a received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 9 a document dated May 6, 1972 and identified as Exhibit E-4 to Plaintiff's Exhibit 1.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 9 received in evidence.)

Colloquy

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 9a an English translation of Exhibit 9, which has been agreed upon.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 9a received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 10 a document dated May 10, 1972 attached to Plaintiff's Exhibit 1 and also marked as [13] Exhibit E-4 in that deposition.

(Plaintiff's Exhibit 10 received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 10a an English translation of Plaintiff's Exhibit 10.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 10a received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 11 a document marked as Exhibit E-5 to Plaintiff's Exhibit 1.

The Court: How many more are there?

Mr. Pollack: Two more.

Mr. Litwin: No objection.

(Plaintiff's Exhibit 11 received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 11a an English translation of Plaintiff's Exhibit 11.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 11a received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 12 the document marked as Exhibit E-6 to Plaintiff's Exhibit 1.

Colloquy

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 12 received in evidence.)

[14] Mr. Pollack: I would like to offer as Plaintiff's Exhibit 12a an English translation of Plaintiff's Exhibit 12.

I would like to note for the record that Plaintiff's Exhibit 12a is both typed and in handwriting because counsel agreed upon some corrections of the translation this morning. I didn't have time to have it retyped.

Mr. Litwin: No objection as corrected.

(Plaintiff's Exhibit 12a received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 13 a copy of the bank statement of the First National City Bank of New York bearing in the lower right-hand corner statement date rendered, 10-7-71.

Mr. Litwin: Consented to.

(Plaintiff's Exhibit 13 received in evidence.)

Mr. Pollack: I would like to offer as Plaintiff's Exhibit 14 a letter dated September 20, 1971 from Marfinco, S.A. to the defendant.

Mr. Litwin: Consented to.

Mr. Pollack: I understand this is a copy from the defendant's files, an original?

Mr. Litwin: This is the original.

The Court: All right, the record will so show.

[15] (Plaintiff's Exhibit 14 received in evidence.)

Mr. Pollack: Your Honor, that's the extent of the plaintiff's exhibits.

Laszlo von Mihaly—for Plaintiff—Direct

The Court: All right.

You were going to call a witness.

Mr. Pollack: I would like to call Mr. Laszlo von Mihaly.

LASZLO VON MIHALY, called as a witness by the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Pollack:

Q. Mr. von Mihaly, are you an officer of the defendant, Perera Company, Inc.? A. I am.

Q. What is your office with that company? A. I am vice-president of the company.

Q. What was your office in September 1971? A. I'm not positive. I may have been assistant treasurer or assistant vice-president.

The Court: You don't know which?

The Witness: I am not sure.

Q. In September 1971 were you in charge of a [16] particular department of Perera Company, Inc.? A. Yes, I was.

Q. What was that department? A. The department is called Customers' Credit Balance.

Q. Could you generally describe the business of that department? A. Yes. We carry accounts for foreign exchange houses and brokers who have their offices abroad.

The Court: Do you carry them for anybody else?

A. No, because—

Laszlo von Mihaly—for Plaintiff—Direct

The Court: Don't say any because. Just answer the questions.

The Witness: Pardon me?

The Court: Just answer what I have asked.

Q. You don't carry these accounts for anybody else except the ones you mentioned? A. We do not.

The Court: You carry accounts for whom?

The Witness: For foreign exchange companies and brokers.

The Court: What kind of brokers, stockbrokers?

The Witness: No, foreign exchange brokers.

The Court: All right, counselor.

[17] How many other departments does Perera Company, Inc. have?

The Court: At the time.

Mr. Pollack: In September 1971.

A. Four or five departments.

Q. Could you describe generally what the business of those other departments is, if you know?

The Court: Was.

Mr. Pollack: I'm sorry. Thank you, your Honor.

Q. Was in September 1971. A. We have a trading department.

The Court: What did that mean?

Laszlo von Mihaly—for Plaintiff—Direct

The Witness: Their function is to buy and sell foreign exchange.

The Court: What else?

The Witness: Then we have a foreign remittance department.

The Court: What did they do?

The Witness: The function is to make remittance abroad in foreign monies.

Q. Were there any others, sir? A. Yes, sir. We have also a travel check department.

[18] The Court: That's for what?

The Witness: Our corporation is an issuer of travel checks.

Q. In September 1971 approximately how many credit balance customer accounts did you have? A. Approximately 250.

The Court: You mean that you gave out travelers checks?

The Witness: Our company issues travelers checks.

The Court: You sold them?

The Witness: Yes, sir.

Mr. Litwin: They issue their own. They are not American Express, your Honor. They are licensed to issue travel checks, Perera Travelers Checks.

The Court: Off the record.

(Discussion off the record.)

Laszlo von Mihaly—for Plaintiff—Direct

The Court: These were issued by Perera; is that right?

The Witness: That's right.

Q. Mr. von Mihaly, I show you Plaintiff's Exhibit 14.
A. Yes.

Q. That is a letter addressed to you; is it not? [19] A.
Yes, to our corporation.

Q. And to your name? A. To my attention.

Q. To your attention? A. Yes.

Q. Right. The letter is from a company called Marfinco, S.A.; is that correct? A. That is correct.

Q. Can you tell me in September of 1971 what the relationship between Marfinco, S.A. and Perera Company was? A. Marfinco, S.A. was one of our customers who carried a balance with us.

The Court: May I see the letter?

(Pause.)

The Court: This letter is from Marfinco, S.A. to Perera Company, attention of this witness, Mr. von Mihaly, and relates to certain checks, two checks of J. Borrello of \$10,000 each. I refer to checks 72 and 73. I suppose those are the numbers on Borrello's checks.

Q. Do you see the number 7 marked in red on Plaintiff's Exhibit 14? A. Yes.

The Court: 7, is it?

Mr. Pollack: Yes.

Laszlo von Mihaly—for Plaintiff—Direct

[20] Q. Is that number put on by your office? A. It is.

Q. Can you explain to us what that means? A. That means that the whole remittance went to our bank for deposit.

The Court: May I see that again?

Mr. Pollack: You can hold that, your Honor. I can let the witness have a copy.

The Court: All right.

That number 7 is against the figure \$33,481.99; is that so?

The Witness: That is correct. We call it a posting code.

The Court: A posting code?

The Witness: Yes.

The Court: 7 is a code?

The Witness: For posting.

The Court: What does that mean?

The Witness: It means that this remittance was destined to be deposited into our bank.

The Court: Were all of these checks contained in the letter, referred to in the letter, contained in the letter?

The Witness: Yes, they were.

[21] The Court: Go on, counselor.

Q. I specifically show you now Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 in evidence.

Were those checks accompanying Plaintiff's Exhibit 14?

A. May I look at the numbers?

Q. Yes. A. Yes, that is correct.

Laszlo von Mihaly—for Plaintiff—Direct

Q. Were these checks and Plaintiff's Exhibit 14 received by your department? A. Yes.

Q. Does Exhibit 14 indicate to you when they were received by your department? A. Yes, it is indicated that they were received on September 23, 1971.

Q. That is, Exhibit 14 bears a stamp of your department indicating the date received; is that correct? A. Well, the stamp of the department which receives mail.

The Court: It's what?

The Witness: The stamp of the department which receives mail.

The Court: What does it mean when it gives a number in red ink on this stamp, with this stamp, [22] 756047?

The Witness: It means the remittance reached us by registered letter.

The Court: Whose numbers?

The Witness: The post office number.

Q. In September 1971 how many employees were there in the customer balance, credit balance department? A. Five.

The Court: How many?

The Witness: In my department, five employees.

Q. Can you tell us the procedure that was used by the department, either in general or, if you know, specifically with regard to Plaintiff's Exhibit 14 and the checks that were enclosed?

Laszlo von Mihaly—for Plaintiff—Direct

The Court: I think it better be specific first.

Mr. Pollack: Strike the question. I will rephrase the question.

The Court: All right, rephrase it.

Q. Do you know how Plaintiff's Exhibit 14 and the checks that were enclosed with it was handled upon receipt by your department? A. Yes.

The Court: How?

The Witness: The checks are screened.

[23] The Court: What do you mean by, "Screened"?

The Witness: By one of our employees, to see whether they are old checks drawn on U.S. banks.

The Court: What else?

The Witness: Then the total amount of the letter and of our tape would be compared.

The Court: What did you do with the checks?

The Witness: The checks are endorsed.

The Court: No. What did you do with these checks specifically?

The Witness: You mean these two checks?

The Court: Yes, those and the others, but particularly those two. What did you do with those checks?

The Witness: They were endorsed to our bank and deposited.

The Court: Who endorsed them for your company?

The Witness: One of the employees.

Laszlo von Mihaly—for Plaintiff—Direct

The Court: One of the what?

The Witness: One of the employees.

The Court: An officer?

The Witness: No, sir.

The Court: Well, who, if you know? Are the checks available? Does that appear to be an [24] endorsement for deposit?

Q. May I show you Plaintiff's Exhibit 3 and 4 in evidence and ask you to look at the back of those. A. Yes, sir.

Q. Do those checks bear a stamped endorsement of Perera Company, Inc.? A. Correct.

The Court: Was it initialed by somebody for your company? Who applied the stamp, if you know? Does it show?

The Witness: No, it doesn't show. It could have been any employee who was endorsing that particular day.

The Court: Some office boy?

The Witness: It could have been.

The Court: It's a very strange custom.

But that's the official endorsement of the defendant Perera then?

The Witness: It is.

The Court: And there's no contention about anything else, is there?

Mr. Litwin: No, this is all agreed between counsel.

The Court: All right.

[25] Let's move on.

Laszlo von Mihaly—for Plaintiff—Direct

Q. The endorsement reads, "Pay to the order of Manufacturers Hanover Trust Company, New York, New York, for credit to the account of the First National Bank of Fleischmanns, Fleischmanns, New York."

Can you explain that? A. Yes. Our account is held with—was held with First National Bank of Fleischmanns.

The Court: New York? Up in the country?

The Witness: Yes. For convenience sake, we deposited all the deposits into that bank account with Manufacturers Hanover Trust, New York.

Q. So the funds eventually go to Perera Company account at the First National Bank of Fleischmanns, is that correct? A. That is correct, yes.

Q. That is what happened to the funds and proceeds of Plaintiff's Exhibits 3 and 4?

The Court: That's what first happened. Something else happened later, I suppose.

The Witness: Yes.

The Court: Elicit how they were credited apparently to this South American company.

Mr. Pollack: Yes, your Honor.

[26] Mr. von Mihaly, when the checks, that is Plaintiff's Exhibit 3, 4 and the other checks indicated on Plaintiff's Exhibit 14 arrived at your department, was any record made of the payees indicated on all those various checks? A. No. We do not do that.

Q. It is not the practice of your department to make any inquiry or record of the named payees on the checks received? A. It is not.

Laszlo von Mihaly—for Plaintiff—Direct

The Court: Let me see 3 and 4 while we are at that point.

(Pause.)

The Court: They are endorsed for deposit only, pay to the credit of Marfinco, S.A., whatever the effect of that is.

Mr. Pollack: I will elicit that, your Honor.

The Court: All right.

Q. Mr. von Mihaly, would you look at Plaintiff's Exhibits 3 and 4 and you noted there is some typed material on the back of each of those checks; do you not? A. Yes.

Q. Do you know who typed that legend on the back of each of those checks? [27] A. We don't know who typed it.

The Court: Do you know who ordered it so typed? Do you understand me?

The Witness: I understand you.

The Court: Stenographers ordinarily, of course, don't do those things without some suggestion from somebody.

Q. You don't know who ordered that typed? A. No, we received them this way.

Q. Do you know personally for sure whether you received them with that legend on the back? A. I have no doubt about it.

Q. Did somebody in your department tell you about it when those checks were received? A. Not in this particular case because we were receiving weekly two, three remittances.

Laszlo von Mihaly—for Plaintiff—Direct

The Court: Let me understand something, just to clarify.

Do you say that when your company received those two checks the typed material on the back was or was not there?

The Witness: Was there.

Q. But you don't really know that for an absolute fact, isn't that correct? [28] A. We know—I know for an absolute fact that all the checks were received from that particular customer, always had that endorsement.

The Court: No. What about these checks? The fact that some others may have had it is not material.

The Witness: I didn't look at them specifically.

Q. You did not? A. No.

The Court: Then your knowledge, of course, is based upon a preceding generalization.

Q. Mr. von Mihaly, would you tell us what internally Perera Company did with the funds represented by Plaintiff's Exhibits 3 and 4? A. Yes. They were credited into the account of Marfinco, S.A.

The Court: Why was that done?

The Witness: The letter was instructing us to do so.

Laszlo von Mihaly—for Plaintiff—Direct

Q. That is—

The Court: Wait a minute now.

That's the letter signed supposedly by Marfinco.

Q. When you received Plaintiff's Exhibit 14, which begins with a sentence, "We enclose the following checks [29] to be credited to our account with you," that is the procedure you followed; is that correct? A. That is correct.

Q. Do you know when Marfinco first opened an account with you? A. I do not remember exactly.

The Court: Are there records on it here?

Q. Do you have any records which would refresh your recollection? A. Yes, sir.

The Court: As refreshed, can you tell the date when the account was started?

The Witness: Yes.

The Court: When?

The Witness: June 21, 1971.

The Court: Is that the entire record of that account, counselor?

Mr. Litwin: No, that's not the record, that's the conditions under which it was opened. It's not the ledger pages.

The Court: In other words, these exhibits show what the account was before the receipt of the \$10,000?

Laszlo von Mihaly—for Plaintiff—Direct

Mr. Litwin: No, they do not.

Off the record.

[30] (Discussion off the record.)

The Court: Who are these people whose names appear as authorized signatories? Who are they?

The Witness: They are officers.

The Court: Who was Mauricio Waroquiers?

The Witness: They are officers of Marfinco, S.A.

The Court: Does it say so anywhere?

The Witness: It says they are authorized signatures, which means they were authorized to operate the account.

The Court: Were they officers, do you know they were officers? You just said they were.

The Witness: Yes.

The Court: Is there anything here that says they were officers on this exhibit? Who was Luis Mansilla? Luis Mansilla, who was he?

The Witness: I don't know him personally, sir.

The Court: Who was Luis Young?

The Witness: For us he's simply an authorized signature.

The Court: Out of the blue, is that the way you did business? Is that the way you did business? Apparently it was.

The Witness: It was correct as far as we were [31] concerned.

The Court: I don't know about that. I wonder about that.

All right, counselor.

Laszlo von Mihaly—for Plaintiff—Direct

Q. Mr. von Mihaly, when you received Plaintiff's Exhibit 14 and the checks indicated in that letter, including Plaintiff's Exhibits 3 and 4, did you or anyone in your department contact Mr. Borrello? A. No, we did not.

The Court: The answer is no?

The Witness: No.

The Court: All right.

Q. In September 1971 did Mr. Borrello have an account with Perera Company, Inc.? A. No.

The Court: At that time did Marfinco have an account with Perera?

The Witness: Yes.

The Court: I think that's in evidence, isn't it?

Mr. Pollack: We'll put the account in evidence in a moment, your Honor.

The Court: All right.

Q. Did you, and by you I mean either yourself or [32] anybody at Perera Company, Inc., have any contact or communications with Mr. Borrello from September 20, 1971 until March 30, 1972 when you received a letter from Mr. Borrello which has been marked as Plaintiff's Exhibit 8?

Mr. Litwin: Off the record.

(Discussion off the record.)

Mr. Pollack: Strike the question. I will start again.

The Court: Withdrawn.

Laszlo von Mihaly—for Plaintiff—Direct

Q. Did you or anyone in your company, to your knowledge, have any contact or communication with Mr. Borrello between the time you received Plaintiff's Exhibits 3 and 4 and the time you received the letter dated March 30, 1972, an English translation of which is marked as Plaintiff's Exhibit 6a? A. No, sir.

The Court: Read that question and the answer.
(Question and answer read.)

Q. Did you or anyone in your company attempt to have any contact with Mr. Borrello during the period described in my previous question? A. No.

Q. Can you tell us as best you can what happened to the \$20,000 as reflected in the books of Perera Company, Inc.

[33] The Court: In other words, you want to know from the books what it shows as to the disposition?

Mr. Pollack: That's right.

A. Yes.

Q. Do you understand my question? A. Yes.

Q. Maybe I can clarify it with a preliminary question.

I understand that the \$20,000 represented by Plaintiff's Exhibits 3 and 4 was deposited in Perera Company, Inc.'s account? A. Correct.

Q. Is that correct? A. Correct.

Q. It was not deposited in a separate bank account of Marfinco, S.A.? A. Right.

Q. It was merely treated as a credit to Marfinco, S.A. on the books of the customer credit balance department? A. That is correct.

Laszlo von Mihaly—for Plaintiff—Direct

Q. All right.

Can you tell us what happened to those funds as reflected in the books of—

[34] The Court: You mean after it was so credited or what? You got it into the credit of Marfinco. What is the question?

Q. Can you describe generally what happened to the Marfinco account? A. Marfinco was using his funds by drawing against them or by ordering us to make payments.

The Court: I still don't quite understand.

Q. Did there come a time when Perera Company, Inc. closed the Marfinco account with it? A. Yes.

Q. When was that? A. That was on February 17, 1972.

The Court: At that time Marfinco no longer had any credit with Perera; is that so?

Mr. Pollack: I will elicit it, your Honor.

The Court: All right.

Q. On February 17, 1972 the transaction that closed the Marfinco account was a transfer of the then balance of \$6,982.43 to Perera Company, Inc., is that right?

Mr. Litwin: Excuse me. I will ask that the exhibit go into evidence and speak for itself. Counsel is questioning about a document.

Laszlo von Mihaly—for Plaintiff—Direct

[35] Mr. Pollack: I am perfectly willing to do that. It's yours.

The Court: Mark it in evidence as a plaintiff's exhibit.

Mr. Pollack: I would like it to be marked as a defendant's exhibit, your Honor.

The Court: You can't do that unless he offers it.

Mr. Pollack: I didn't want to offer it.

The Court: You don't have to offer it.

Mr. Pollack: I was asking the witness a question.

The Court: There was an objection that the paper shows what was done.

Show him the paper and ask him if he knows what was done.

Mr. Pollack: Yes, your Honor.

Q. Can you tell me what the last transaction concerning the Marfinco account with Perera Company, Inc. was?

A. Yes. It states here, "Transfer to suspense account—"

The Court: What does that mean? Finish your answer.

The Witness: "—to meet eventual claims and legal expenses."

[36] The Court: In other words, it was transferred, I take it, to some suspense account subject to some other claims of Perera against that; is that right?

The Witness: That's right.

The Court: What were those claims for, legal expenses for what?

Laszlo von Mihaly—for Plaintiff—Direct

The Witness: We learned that—

The Court: You learned what?

The Witness: That Mr. Waroquiers—

The Court: Who was he?

The Witness: He was one of the officers.

The Court: Of?

The Witness: Of Marfinco, S.A.

The Court: Yes.

The Witness: He fled the country with funds of his clients.

The Court: In other words, you learned about some embezzlement of some officer of Marfinco; is that the substance of it?

The Witness: That is correct.

Q. Just to complete your prior answer, can you indicate the sum that was transferred to the suspense account?

A. The sum was \$6,982.43.

[37] Mr. Litwin: I move to strike the testimony, your Honor, from the ledger pages unless the plaintiff offers them in evidence. I think he cannot have a witness testify as to the contents of a document without putting it in.

The Court: There might be something to that, counselor.

Mr. Pollack: I don't want to adopt this as my exhibit, your Honor.

The Court: What difference does it make? He's told what it was done for and it certainly isn't guilded with any degree of sanctity.

Laszlo von Mihaly—for Plaintiff—Direct

Mr. Pollack: All right. I will mark it, the entire account.

Mr. Litwin: No objection.

The Court: It's explained by what the testimony was.

(Plaintiff's Exhibit 15 received in evidence.)

The Court: I will let the testimony stand, counselor.

Mr. Litwin: Yes, I withdraw the objection in view of the offer by the plaintiff's attorney.

The Court: Was this allocation of this amount, whatever you said it was, and which is shown in [38] the exhibit, I assume, was that done with the consent or authorization of any officer of Marfinco?

The Witness: No, we made it on our own.

The Court: Solely on your own initiative?

The Witness: Yes.

The Court: All right.

Q. Mr. von Mihaly, can you tell us what Plaintiff's Exhibit 15 is a copy of? A. It represents the movement of the account, Marfinco, S.A.—

The Court: From Marfinco's credit to Perera's special suspense fund; is that right? All right. Read what I said.

Q. That is, Plaintiff's Exhibit 15 represents the entire Marfinco account and not just the transactions reflected by Plaintiff's Exhibits 3 and 4. A. Not entirely. I see it begins with ledger sheet number 12.

Laszlo von Mihaly—for Plaintiff—Direct—Cross.

The Court: Supposedly at least there were 11 other ledger sheets. I don't know.

Q. Tell me what it is. Is it the account beginning at a certain date and ending at a certain date?

The Court: What is the date of beginning?

The Witness: It reflects the movement of the [39] account as of September 17, 1971.

The Court: And it ends when?

The Witness: Until February 17, 1972.

The Court: February 17, 1972, that is when this transfer was done to apparently exert some kind of a lien against the account, Marfinco, in favor of Perera.

Mr. Litwin: That right.

Mr. Pollack: Off the record.

(Discussion off the record.)

Mr. Pollack: I have no further questions of this witness.

The Court: We will take a short recess.

(Recess.)

The Court: You may cross examine, Mr. Litwin.

Mr. Litwin: Thank you, your Honor.

Cross Examination by Mr. Litwin:

Q. Mr. von Mihaly, can you tell us more specifically what information reached you around February 17, 1972?

The Court: About what?

Laszlo von Mihaly—for Plaintiff—Cross

Q. February 17, 1972 which led to the suspense account entry on the ledger page? [40] A. Yes. We have received a cutting from a newspaper—

Q. You mean a newspaper clipping? A. Yes, a newspaper clipping from Buenos Aires stating that Mr. Waroquiers left the country after embezzling funds of his clients.

The Court: Of his client? Who was his client?

The Witness: His clientele.

Mr. Litwin: I will develop it, your Honor.

The Court: I hope you can. It's meaningless to me.

Mr. Litwin: Yes, I will develop it.

The Court: All right.

Q. Upon receipt of that newspaper clipping from Buenos Aires, Argentina you made a decision to put a hold on the account, is that what you are telling us? A. That is correct.

Q. At that time was there still a credit balance of \$6,982.43? A. I couldn't specify exactly when we got that information—

Q. No, I didn't ask you that.

When you got the information and blocked the account, what was the credit balance in Marfinco's account? [41]

A. That was the balance, \$6,900.00.

Q. \$982.45? A. Yes, sir.

Q. Do you still have that money? A. No.

The Court: What did you do with it?

Q. Please tell us what happened thereafter. A. We were approached by one of the officers of Marfinco, S.A. on the phone requesting us to send them that balance.

Laszlo von Mihaly—for Plaintiff—Cross

The Court: Did they give you any assurances about any payment of their deficit? There was a deficit, wasn't there?

Mr. Litwin: No.

The Court: Was there any deficit?

The Witness: No, there was no deficit.

The Court: Did your attorney advise you about this, Perera's attorney?

A. Yes.

The Court: Who was the attorney?

The Witness: Mr. Litwin.

Q. You called me? A. Yes.

Q. You remember that? [42] A. Yes.

Q. You said that the customer had asked for its money?

A. Yes.

Q. What did I tell you to do? A. To make a check payable to Marfinco, S.A. and mail it.

Q. Did you do that? A. We did do that.

Q. Is that the check about which you have testified? A. This is the check.

Mr. Litwin: I offer it in evidence.

The Court: It shows the transaction no matter what merit the transaction may have.

Mr. Pollack: No objection.

(Defendant's Exhibit A received in evidence.)

The Court: Is this your signature on the check?

The Witness: Yes, one of them is mine.

Laszlo von Mihaly—for Plaintiff—Cross

The Court: Who is the others?

The Witness: Mr. Goodman's, who is here.

The Court: Who is Mr. Goodman?

The Witness: Mr. Goodman is Executive Vice-President of Perera Company.

The Court: Was he so in March of 1972?

[43] The Witness: At that time he was Senior Vice-President.

The Court: Was it next below Executive Vice-President?

The Witness: At that time we had no Executive Vice-President.

Q. Mr. von Mihaly, after the making and clearing of this check, Defendant's Exhibit A, did Perera hold any money whatsoever of Marfinco? A. None at all.

Q. Mr. von Mihaly, as a part of your business experience, have you had occasion to deal with checks and signatures and endorsements on them? A. Yes.

The Court: What are you trying to qualify him for?

Mr. Litwin: To qualify on the endorsement on the back of the check.

The Court: State your question and you may object to it.

Mr. Litwin: I'm just asking his qualifications.

The Court: I know, but your adversary may object upon the ground that he isn't qualified.

Mr. Pollack: I object to any attempt to qualify [44] this witness as an expert in anything except his own company's procedures.

Laszlo von Mihaly—for Plaintiff—Cross

The Court: Yes, sustained.

You can ask a question, but I shall have to sustain the objection.

Q. Mr. von Mihaly, will you kindly look at Exhibits 3 and 4, particularly the endorsement on the back—

The Court: On which one now?

Mr. Litwin: Both Exhibits 3 and 4.

Q. Can you tell us from the typewriting whether that was done on a Perera typewriter in your office?

Mr. Pollack: I will object to that, your Honor. This witness is not qualified. In addition, the description by counsel of the back of the check is incorrect.

The Court: Let's see the checks.

Mr. Pollack: This witness is not qualified to analyze a typewriter.

The Court: Sustained.

Mr. Litwin: Your Honor, if I may, I would offer to prove that this witness has dealt in his business career with tens of thousands of checks, is qualified to look at signatures and typewriting—

[45] The Court: It's not a signature.

Mr. Litwin: I'm offering to prove that he is qualified.

The Court: The offer is noted. I see no propriety to the admission of the testimony because he is not qualified, I'm sorry to say, counselor.

Laszlo von Mihaly—for Plaintiff—Cross

Q. Mr. von Mihaly, can you say whether the endorsements on the reverse side of the checks, Exhibits 3 and 4, were typed in your office under your direction?

The Court: This is merely a proffer now, counselor.

I shall have to sustain the objection.

Mr. Litwin: I'm asking him, your Honor, whether he directed someone in his office to type those endorsements.

The Court: Read the question.

(Question read.)

Mr. Pollack: I object, your Honor. The question is confusing. If counsel intends to direct the witness' attention to that typed portion, he can do so, but he's labeling it as an endorsement. That is a kind of legal label that ought not to be used at this stage.

There is a stamped endorsement.

[46] The Court: I don't know about that. Almost anything on the back of a check has some kind of endorsement if it's signed. This says, "For deposit only, pay to the credit."

You object to the form of the question?

Mr. Pollack: I object to the form of the question, the use of the word endorsement.

The Court: Sustained as to form.

Q. Mr. von Mihaly—

The Court: Ask him if he did so and so.

Laszlo von Mihaly—for Plaintiff—Cross

Q. Mr. von Mihaly, I refer to the legend typewritten on the reverse side of Exhibits 3 and 4 which reads, "For deposit only, pay to the credit of Marfinco, S.A."

The question is: Was that legend typed in your office under your direction? A. It wasn't.

Q. Has Perera Company, to your knowledge, and your department ever typed on the back of a check any matter without the authority of your customer? A. No.

Mr. Pollack: I will object to that, your Honor.

The Court: Sustained. That's too broad.

[47] I don't know how he can tell.

Q. Do the people in your department under your supervision have the authority to put writings other than Perera's bank endorsement on the reverse side of customers' checks without clearing with you? A. No, sir.

Q. Do you know when in the month of April 1972 you received Mr. Borrello's letter dated March 30, 1972?

The Court: What exhibit?

Mr. Litwin: I'm looking, your Honor.

Exhibit 6, the letter dated March 30, 1972.

Q. The question is when in April did you receive it, if you know?

The Court: Maybe it was in March.

A. No, I don't know.

The Court: The question should be: Do you know when it was received?

Laszlo von Mihaly—for Plaintiff—Cross

The Witness: I don't know exactly. Approximately five, six days after the date of the letter.

Q. This is the letter mailed to you from Buenos Aires?

A. That's correct.

Q. By the plaintiff? A. Yes.

[48] The Court: On what do you base that recollection generalities of the time of letters?

The Witness: Yes, sir.

The Court: That's the only basis for it? Is that the only basis for your statement?

The Witness: Yes.

Q. Do you have a small or medium or large volume of correspondence between your office and Buenos Aires, Argentina? A. It's a large one.

Mr. Pollack: I will object to that, your Honor.

The Court: Isn't there a stamp on the letter?

Mr. Litwin: We are working from a translation and the plaintiff's copy.

The Court: Doesn't the copy show the stamp?

Mr. Litwin: It's the plaintiff's copy, your Honor, which he supplied to the U.S. Consul in Argentina.

The Court: Go on to something else.

Q. Prior to the receipt of Exhibit 6a, at the end of March or the beginning of April 1972, had you ever heard of Mr. Borrello? A. No, sir.

[49] Q. Did Mr. Borrello ever send any instruction to

Laszlo von Mihaly—for Plaintiff—Cross

Perera as to the disposition of the \$20,000 represented by Exhibits 3 and 4, if you know? A. No.

The Court: You don't know of any; is that right?

The Witness: I don't know of any instructions.

Q. Did you ever receive any instructions—

The Court: Which is it, he or Perera?

Q. The Perera Company, to your knowledge, did they receive any instructions in respect to that \$20,000 from the firm of Waroquiers, S.A.? A. No.

Q. Other than the September 20, 1971 letter from Marfinco which accompanied the checks, did you receive any instructions from Marfinco in respect to the plaintiff's \$20,000?

The Court: In writing?

Q. In any form. A. No, in no form.

The Court: Do you know positively that none were received by Perera or is it just your knowledge that as far as you know none were received?

The Witness: As far as I know, nothing was [50] received by our department.

Q. Mr. von Mihaly, I refer you to Plaintiff's Exhibit 15, the ledger pages.

Were the ledger pages kept in your department under your supervision and control? A. Yes.

Laszlo von Mihaly—for Plaintiff—Cross

The Court: All of them?

The Witness: All of them.

The Court: Did you make the entries?

The Witness: No, sir.

The Court: Who did?

The Witness: An employee whose job is or was at that time to post the entries.

Q. Were you the head of the department? A. Yes, sir.

Q. And had supervision and control? A. Yes, sir.

Q. Did your department enter on the ledger pages of transactions with the customer, Marfinco, S.A.? A. Yes.

Q. You testified that certain people were authorized to sign letters on behalf of Marfinco, S.A. A. Correct.

The Court: No, he didn't say that.

[51] Q. You tell us, what was it?

The Court: It's stated in the paper, isn't it?

Mr. Litwin: We are not a bank. They don't have our checks, your Honor. Payment orders come in by letter. I know what I'm talking about.

The Court: Maybe you do. Let's see that exhibit with those names on it.

Mr. Litwin: I will put it in evidence. It's not in yet.

The Court: Offer it and see if we can find out what it means. I don't think it's very clear what it means.

Mr. Litwin: Is this agreeable?

Mr. Pollack: I have no objection.

(Defendant's Exhibit B received in evidence.)

Laszlo von Mihaly—for Plaintiff—Cross

Q. Mr. von Mihaly, with reference to the condition sheet, Exhibit B, will you tell us what the significance of this is in Perera's operations?

The Court: The whole thing?

Mr. Litwin: The condition sheet, yes, what it means.

The Court: Go ahead.

Answer the question.

A. The condition sheet comprises the conditions [52] under which the account has to be carried.

The Court: This particular sheet related to whose account, if anybody's?

The Witness: This particular sheet relates to the account of Marfinco, S.A.

The Court: What does it mean, if you know, if you can tell us, when it says—is it authorized signatures?

The Witness: It means—

The Court: Down at the bottom. Authorized signatures on what?

The Witness: On the operating of the account.

The Court: What do you mean by that?

The Witness: The right to give instructions to draw drafts.

The Court: Draw drafts on Perera?

The Witness: That is correct.

The Court: Is that all?

The Witness: To extend payment orders.

The Court: All right.

Laszlo von Mihaly—for Plaintiff—Cross

Q. In other words, Mr. von Mihaly, if you receive from that customer, Marfinco, a letter or a payment order or a draft, would one of your clerks take it to the condition sheet and compare the signatures [53] A. If necessary, yes.

The Court: That is 100% perfection.

Mr. Pollack: Off the record.

(Discussion off the record.)

Q. Do you have actual signatures in your files from each of these authorized signatures? A. Yes, but the file I believe is not in my hands at the moment.

The Court: It's what?

The Witness: It's not—it's not in my hands, not in our office.

The Court: Where is it?

The Witness: I hope it is with one of the lawyers.

Q. Did you have it at the time when the account was opened? A. Yes.

Q. Did you have it up until the time of this lawsuit? A. Yes, sir.

Q. Mr. von Mihaly, did you meet some of these people who had authorized signatures rights on the Marfinco account? A. Yes.

[54] Q. Please tell us approximately when.

The Court: What difference does it make?

Mr. Litwin: Your Honor, you commented before

Laszlo von Mihaly—for Plaintiff—Cross

on this haphazard way of doing it. I wanted to show you that he met these people face to face.

The Court: That doesn't mean, face to face, anything about the signatures.

Go ahead if you think you've got anything.

A. I met personally Mr. Mauricio Waroquiers at the time when I visited the company.

The Court: When you did what?

The Witness: When I visited the company to open—to have opened an account with our company.

The Court: When he visited your company?

The Witness: No.

The Court: Whose company?

The Witness: I visited Mr. Waroquiers' company in Buenos Aires.

The Court: Marfinco?

The Witness: Yes.

The Court: You usually go around to do that?

The Witness: Yes.

The Court: Go ahead. That shows you might have known him. What that has to do with his signature, [55] it's beyond me.

Go on.

Q. You were in the office of Marfinco in Buenos Aires?

The Court: When, at any time?

A. I beg your pardon?

Q. Were you at any time in the office of Marfinco in Buenos Aires? A. I was in the office of Waroquiers.

Laszlo von Mihaly—for Plaintiff—Cross

Q. Waroquiers, S.A.? A. Yes, in Buenos Aires.

Q. At that time you spoke with Mr. Waroquiers? A. Yes, sir.

Q. Was the account for Marfinco, S.A. opened as a result of that discussion with Mr. Waroquiers? A. That is correct.

Q. Mr. von Mihaly, at the time when this action was started in December of 1972, did the summons and complaint, which I have just handed you, come to your attention in your office? A. Yes, sir.

Q. Please refer to paragraph 8 of the complaint. A. Paragraph 8?

Q. Yes. [56] A. Yes, sir.

Q. Have you read it? A. I have read it.

Q. Do you find there an allegation in substance that when this \$20,000 came in Marfinco owed that money to Perera and that you, therefore, applied it to discharge Marfinco's debt? A. There is such an allegation.

Q. Is it true?

Mr. Pollack: If your Honor please—

The Court: Obviously the allegations of the complaint and the allegations of the answer are before the Court.

They may or may not be true.

Q. Mr. von Mihaly, at the time when you received Exhibit 14, the letter from Marfinco enclosing checks including the plaintiff's \$20,000, was it entered on the ledger page? A. Yes, sir.

Laszlo von Mihaly—for Plaintiff—Cross

Q. I am referring to letter number 38 from Marfinco.

A. It was entered yes.

Q. Do you find it on the ledger page in front of you, Exhibit 15? [57] A. Yes, sir, ledger page number 12.

Q. All right.

At the bottom of ledger page number 12 did you enter as a credit to Marfinco the remittance of 33,000 odd dollars which reached you that day? A. Yes, sir.

Q. What was their balance before you got that letter?

A. Before we got that letter, on the previous day \$235,332.86.

Q. All right.

After crediting their account with the proceeds of Exhibit 14, what was their credit balance? A. It was \$208,263.71 because we paid some drafts drawn by Marfinco.

The Court: Some what?

The Witness: Some drafts.

Q. So they drew against their account and they had a credit to their account at that time? A. Yes.

The Court: Was it the same way?

The Witness: Yes.

The Court: Both the credit and the drafts?

A. Yes.

Q. Go to the next page and the next entry.

[58] What was their balance on the opening entry the next day? A. The next day—

Colloquy

Mr. Pollack: If your Honor please, at counsel's request we put the whole document into evidence.

The Court: Yes, it's there.

Mr. Litwin: Withdrawn.

The Court: Question withdrawn.

Mr. Litwin: No further questions of Mr. von Mihaly.

Mr. Pollack: No redirect.

The Court: You are excused.

(Witness excused.)

Mr. Pollack: Plaintiff rests, your Honor.

The Court: I will reserve all motions.

Do you want to put some testimony in or—

Mr. Litwin: Shall I make the motions for the record or will they be deemed made?

The Court: They will be deemed to have been made with all of the defense set up in the answer.

Mr. Litwin: Will you permit me, your Honor, to add to the general motion to dismiss a specific specification—I'm sorry for the clumsy choice of words—that the allegation of the complaint, particularly [59] paragraph 8, that Perera used the plaintiff's money to make itself whole is contradicted by the ledger pages which are in evidence, Exhibit 15.

The Court: You are going to be asked to submit findings and you can supply any finding that is based on exhibits or evidence, either side. I am not going to pass on this.

Mr. Litwin: All right. Excuse me a moment.

(Pause.)

Colloquy

Mr. Litwin: The defendant rests, your Honor.

The Court: No testimony?

Mr. Litwin: That's right.

The Court: No proof except what may be in?

Mr. Litwin: Documents.

The Court: All right.

The case is ended as far as the trial is concerned, gentlemen.

Mr. Pollack: Your Honor, do you want the transcript?

The Court: I think I will have to have it because there were a good many oral statements made there and references to exhibits.

(Discussion off the record.)

[60] The Court: When after you get the record will you have your papers?

Mr. Pollack: A week.

The Court: All right.

How long after you get his will you have yours.

Mr. Litwin: Ten days.

The Court: Don't expect me to give this to you in July or early August. It will be September at least, gentlemen.

Mr. Pollack: May I have some time for reply?

The Court: Yes. One week for reply.

* * * * *

Plaintiff's Exhibit 2

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5368 R.H.L.

JOSE BORRELLO,

Plaintiff,

—against—

PERERA COMPANY, INC.,

Defendant.

QUESTIONS ON DEPOSITION

Questions to be asked of JOSE BORRELLO of the City of Buenos Aires, Republic of Argentina, a party whose deposition upon written questions is to be taken, pursuant to a Notice dated October 15, 1973 on behalf of the plaintiff in the above entitled action:

1. What is your name?

Jose Borrello.

2. What is your home address?

1334 Ecuador Street, 4th floor, Apt. "A", Buenos Aires, Argentina.

3. What is your age?

79 years.

Plaintiff's Exhibit 2

4. Have you received any instructions from your physician with regard to travel?

Yes.

5. If the answer to question number "4" is "yes" state the instructions.

My physician extended a certificate stating that I must not travel due to a heart condition and to blood pressure. I forwarded that certificate to Dr. Frank Fredericks, of New York.

6. Please describe your occupation or profession, or if retired, your former occupation or profession.

I am retired. I have been an exporter and importer.

7. Please describe generally the nature of your business experience.

Manager of José Borrello y Cia. S.R.L. I took care of dealing with the banks, sale and purchase of goods and in general of the whole business operation.

8. On September 20, 1971, did you draw two checks, each in the amount of \$10,000, on your account at First National City Bank, New York, N.Y. to the order of "Perera Co. Inc."

Yes.

9. If the answer to question number "8" is "yes," attach the checks and state whether your signature appears on those checks.

Yes.

Plaintiff's Exhibit 2

(The witness submits the two original checks, which are marked as Exhibit "A" and "B" by the Consular Officer).

10. Where were you when you wrote those checks?

At home, in Buenos Aires.

11. Who suggested that the checks be made to the order of "PERERA CO. Inc."

Waroquiers S.A.

12. Did you type the words "PERERA CO. Inc." on the face of the checks?

No.

13. If the answer to the previous question is "no", state the name or the position of the person who typed the name on the face of the checks.

Mr. Charisse, who declared to be an employee.

14. Did the words "PERERA CO. Inc." appear on the face of the check at the time you signed the check?

No.

15. Did you type the phrase "For Deposit Only—Pay to the credit of Marfinco S.A." on the back of each of the checks?

No.

16. Was there anything typed on the back of either of the checks at the time you signed the checks?

No.

Plaintiff's Exhibit 2

17. If the answer to the previous question is "yes," state the words that appeared on the backs of the checks.

Not applicable.

18. Did you see anyone type the phrase that appears on the back of the checks?

No.

19. If the answer to the previous question is "yes," describe the person and the circumstances.

Not applicable.

20. Prior to September 20, 1971, had you ever had any business transactions with the firm of Perera Company, Inc.?

No.

21. Did you ever have any business or commercial transactions with the firm of Waroquiers, S.A. in Buenos Aires?

Yes.

22. If the answer to the previous question is "yes," would you describe the nature of your transactions with that firm, and the number of years you have had business transactions with it?

From about 1960. He was my broker and had in his hands all my stock and administered same. He collected coupons and credited them to my account.

Plaintiff's Exhibit 2

23. On September 20, 1971, did you have a conversation with an officer or employee of Waroquiers, S.A. in relation to the two checks?

Yes.

24. If the answer to the previous question is "yes," please state the name of the officer or employee, and state what you said to that person, and what that person said to you.

Mr. Clarisse. I told him I was delivering him these checks to buy Argentine Government External bonds. That he should buy them in New York using the funds I had deposited there. They agreed and told me to put those checks to the name of Perera Co. Inc. of New York to have them available at the time the bonds were delivered. To that purpose I gave them a letter.

25. Who suggested that two separate checks be issued?

Nobody.

26. Did you have any specific reason for issuing two checks rather than one check?

Yes, because I wanted to carry out the business deal with two banking institutions. But Waroquiers told me he could take care of that directly. I gave him the two checks, since I trusted them entirely. At that time he typed—Mr. Clarisse did—the name of Perera Co. Inc. on them.

27. To whom did you deliver the two checks?

Mr. Clerici.

Plaintiff's Exhibit 2

28. Did you receive any receipt or other document from the person or firm to whom you delivered the two checks?

No.

29. If the answer to the previous question is "yes," produce, identify, and attach a copy of any such document.

Not applicable.

30. Did you issue any written instructions to Waroquiers, S.A. with regard to the transaction related to the two checks?

Yes.

31. If the answer to the previous question is "yes," identify, produce and attach a copy of the document.

(The Witness submits the document, identifies it and is then marked as Exhibit "C" by the Consular Officer.)

32. On or subsequent to September 20, 1971, did you ever issue written or oral instructions to Waroquiers, S.A. for the purchase, for your account, of Argentine Government External Bonds?

33. If the answer to the previous question is "yes," produce, identify, and attach a copy of written instructions, and if the instructions were oral, state the date when such discussions took place, the persons involved, and the substance of the discussion.

Plaintiff's Exhibit 2

34. Did you at any time receive any notice, advice, or written report from Waroquiers, S.A. with respect to the transaction relating to the issuance of the two checks?

35. If the answer to the previous question is "yes," produce, identify and attach a copy of the documents received.

Not applicable.

36. Have you ever received any securities from Waroquiers, S.A. on account of your delivery to them of the above mentioned two checks?

No.

37. If the answer to the previous question is "yes," describe the facts and circumstances.

Not applicable.

38. Have you ever received payment of any part of the \$20,000 from Waroquiers, S.A. or from any other person or firm?

No.

39. If the answer to the previous question is "yes," state the facts and circumstances.

Not applicable.

40. Prior to September 20, 1971, did you ever have any business or other dealings with the firm of Marfinco, S.A.?

No.

Plaintiff's Exhibit 2

41. Prior to September 20, 1971, did the name "Marfinco, S.A." appear in any way on the door of the Buenos Aires offices of Waroquiers, S.A.?

No.

42. Did you ever have any discussions with any employee or officer of Waroquiers, S.A. with respect to the firm of Marfinco, S.A.?

No.

43. If the answer to the previous question is "yes," state when, where, and with whom such discussion took place, and state what you said and what was said to you during the course of the discussion.

Not applicable.

44. Prior to the dispute which is the subject matter of this action, or prior to your examination of the back of the above mentioned two checks, had you ever heard of the firm of Marfinco, S.A.?

No.

45. When did you receive the two checks dated September 20, 1971 from First National City Bank, New York, New York, showing that the checks had been negotiated?

In October 1971.

46. State when you received the October 7, 1971 bank statement of First National City Bank, indicating that your

Plaintiff's Exhibit 2

account had been debited in the total amount of \$20,000 as a result of the negotiation of the two checks.

In November 1971.

47. Did you look at the back of the two checks when you first received them from First National City Bank?

Yes.

48. If the answer to the previous question is "no," state when you first looked at the backs of the two checks.

Not applicable.

49. Had you seen the typed phrase "For Deposit Only—Pay to Credit of Marfinco S.A." on the back of each of the checks prior to their delivery to you by mail from First National City Bank after negotiation?

No, the first time I saw it was when the checks were returned.

50. Did there come a time when you had some reason to be suspicious of the activities of Waroquiers, S.A.?

Yes.

51. If the answer to the previous question is "yes," state the approximate date and the circumstances.

On February 15, 1972, when the papers started to comment on the firm.

52. Did there come a time when you instructed the defendant to deliver and deposit the sum of \$20,000 to your

Plaintiff's Exhibit 2

benefit, in your account at First National City Bank, New York, N.Y.?

Yes.

53. If the answer to the previous question is "yes," describe the circumstances.

On March 30, 1972 I wrote a letter to Perera Co. Inc. asking them to return the 20,000 dollars and to deposit them with my account in the National City Bank of New York.

54. Between September 20, 1971 and the date you issued instructions to Perera Company Inc., did you have any reason to believe that Perera Company Inc. was not holding the \$20,000 to your credit?

No.

55. If the answer to the previous question is "yes," state the circumstances and reason for your belief.

Not applicable.

56. Approximately when did you first establish your account at First National City Bank, New York, New York?

1946.

Plaintiff's Exhibit 2

57. In September 1971, did you have any reason to believe that maintenance of a dollar bank account in your name at First National City Bank, New York, New York, was in violation of the laws of Argentina?

No.

58. On or after September 20, 1971, did you have any reason to believe that the purchase of Argentine Government External Bond by transfer by you, of funds on deposit in the United States, was not permitted by the laws of Argentina?

No.

FRANK & FREDERICKS

Attorneys for Plaintiff

Office & P.O. Address

41 East 42nd Street

New York, New York 10017

Tel. No. MU 2-0760

Plaintiff's Exhibit 2

1. List the trips you have taken in the past twelve months giving:

- (a) point of origin
- (b) destination
- (c) length of stay
- (d) mileage of round trip
- (a) Buenos Aires.
- (b) Mar del Plata.
- (c) Three months and a half.
- (d) 280 miles.

2. On each trip, was it by airplane, automobile, train or bus?

I went by car, driven by a third party, and returned by train.

3. Did you see all or any of the first fifty-eight questions prior to your appearance at the office of the American Consul?

No.

4. If yes, under what circumstances?

Not applicable.

5. Did you see all or any of the next 50 questions prior to your appearance at the office of the American Consul?

No.

Plaintiff's Exhibit 2

6. If yes, under what circumstances?

Not applicable.

7. Was Perera Company made the payee of your checks with your consent?

Yes.

8. Did you direct Waroquiers, S.A. to purchase for your account \$20,000.00 of Argentine External Bonds?

Yes.

9. For what purpose did you place \$20,000.00 at the disposal of your broker, Waroquiers, S.A.?

So that he might have at his disposal enough funds to buy the bonds.

10. Did you agree to a delay in the investment of your money by Waroquiers, S.A.?

Yes.

11. If yes, how long was the delay?

Four months.

12. Who suggested the delay?

Waroquiers.

13. Was the intended investment ever made?

No.

Plaintiff's Exhibit 2

14. If yes, attach documents showing the investment.

Not applicable.

15. Did you receive from Waroquiers, S.A. a written acknowledgment of your \$20,000.00 deposit?

No.

16. If yes, attach a copy.

Not applicable.

17. Did you receive from Waroquiers, S.A. monthly or other periodic statements of your account?

Yes.

18. If yes, attach the documents.

(The Witness submits and delivers the documents to the Consular Officer, who marks them as Exhibit "D").

19. Have you ever visited the offices of Waroquiers, S.A.?

Yes.

20. If yes, how many times?

Once or twice.

21. Did the firm Marfinco, S.A. share space with or use an office adjoining the office of Waroquiers, S.A.?

I don't know. I never saw the Marfinco S.A. Firm.

Plaintiff's Exhibit 2

22. Have you ever had dealings with Marfinco, S.A. on or after September 20, 1971?

No.

23. If yes, describe them.

Not applicable.

24. Do you know the business activities in which Marfinco, S.A. was engaged?

No.

25. When did you first hear of the firm Marfinco, S.A.?

When I looked at the back of the checks.

26. Set forth a copy of each letter you sent to Perera Company and of each reply by Perera Company.

(The witness submits copies of the letters he wrote to Perera Co. Inc. and of their answers, which are marked by the Consular Officer as Exhibit "E").

27. At the time when you wrote the first letter to Perera Company, was it already known to you that Waroquiers, S.A. was in financial difficulty?

Yes.

28. When did you first learn that Waroquiers, S.A. was in financial difficulty?

On February 15, 1972.

29. At that time, what did you learn?

That Waroquiers had vanished from the market.

Plaintiff's Exhibit 2

30. From what source did you learn it?

From the newspapers.

31. What stocks, bonds and cash was Waroquiers, S.A. holding for you at that time?

Only the 20.000 dollars I had delivered to him.

32. At that time, were there any debits in your account with Waroquiers, S.A.?

No.

33. If yes, describe them.

Not applicable.

34. Describe each and every effort which you made to obtain money or securities from Waroquiers, S.A. giving the date of each effort.

When I learnt about Waroquiers' disappearance I went to their offices but found no one. When I returned, definitely, in February, I found Mr. Cancel, who had denounced the disappearance of Messrs. Waroquiers y Cia.

35. Did you write any letters to Waroquiers, S.A. after learning of its financial difficulties?

No.

36. If yes, set forth copies.

Not applicable.

Plaintiff's Exhibit 2

37. Did Waroquiers, S.A. reply to your letters?

Not applicable.

38. If yes, set forth copies.

Not applicable.

39. Did you retain the services of a lawyer to deal with Waroquiers, S.A.?

Yes.

40. If yes, give the date of your first discussion with the lawyer and his name and address.

At the end of February or beginning of March, 1972. Juan Kraiselburd, 719 R.Bamba Street, ground floor, "C", Federal Capital, Argentina.

41. When did you first contact Perera Company regarding this difficulty?

Through a letter which I sent him on March 30, 1972.

42. Attach a copy of your first communication to Perera Company in this regard.

(The copy of this communication was submitted by the Witness and marked by the Consular Officer as Exhibit F).

43. Approximately when did the First National City Bank statement of your account as of October 7, 1971 reach the address shown on the statement, namely, Ecuador 1334, Buenos Aires, Argentina?

End of October or beginning of November 1971.

Plaintiff's Exhibit 2

44. When did it come into your hands?

On that same day.

45. Where were you at that time?

At my home, in Buenos Aires.

46. Were three checks enclosed with the statement as of October 7, 1971?

Only two checks were enclosed.

47. If yes, were two of those three checks payable to the order of Perera Company in the sum of \$10,000.00 each?

Both checks were payable to the order of Perera Company Inc. in the sum of 10.000 dollars each.

48. Was the third check in the sum of \$300.00?

There was not such a third check.

49. Did you look at the checks?

Yes.

50. Did you look at the endorsements on the reverse side of the checks?

Yes.

Redirect Questions

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5368 R.H.L.

[SAME TITLE]

Redirect questions to be asked of JOSE BORRELLO of the City of Buenos Aires, Republic of Argentina, a party whose deposition upon written questions is to be taken, pursuant to a Notice dated October 15, 1973, on behalf of the plaintiff in the above-entitled action:

1. Did you deliver written instructions to Waroquiers, S.A., in connection with the delivery to it of two checks, each in the amount of \$10,000?

Yes.

2. If the answer to Question No. "1" is "Yes", state the date and place of such delivery and attach a copy of any such writing.

September 20, 1971. I refer to my answer to previous questions, where I stated that instructions were given by me in writing, as per attached letter, which is marked as Exhibit .

3. Did you receive any written document from Waroquiers, S.A., in connection with the delivery to it of two checks, each in the amount of \$10,000?

No.

Redirect Questions

4. If the answer to Question No. "2" is "Yes", state the date and place of such delivery and attach a copy of any such writing.

Not applicable.

(Original version in Spanish signed by the witness Jose Borrello).

FRANK & FREDERICKS
Attorneys for Plaintiff


527

79a

Plaintiff's Exhibit 3

80a

Plaintiff's Exhibit 4

(See opposite) 

JOSEFA BORRELLO DE BORRELLO
JOSE BORRELLO

39

1-8
210

52

September 30th 1941

PAY TO THE
ORDER OF

Perera C. Inc.

404-1111

\$1000.00

Ten hundred and 00/100

6

DOLLARS

FIRST NATIONAL CITY BANK

HUDSON ST. AT FRANKLIN ST.

NEW YORK, N.Y.

0021000081 04352257

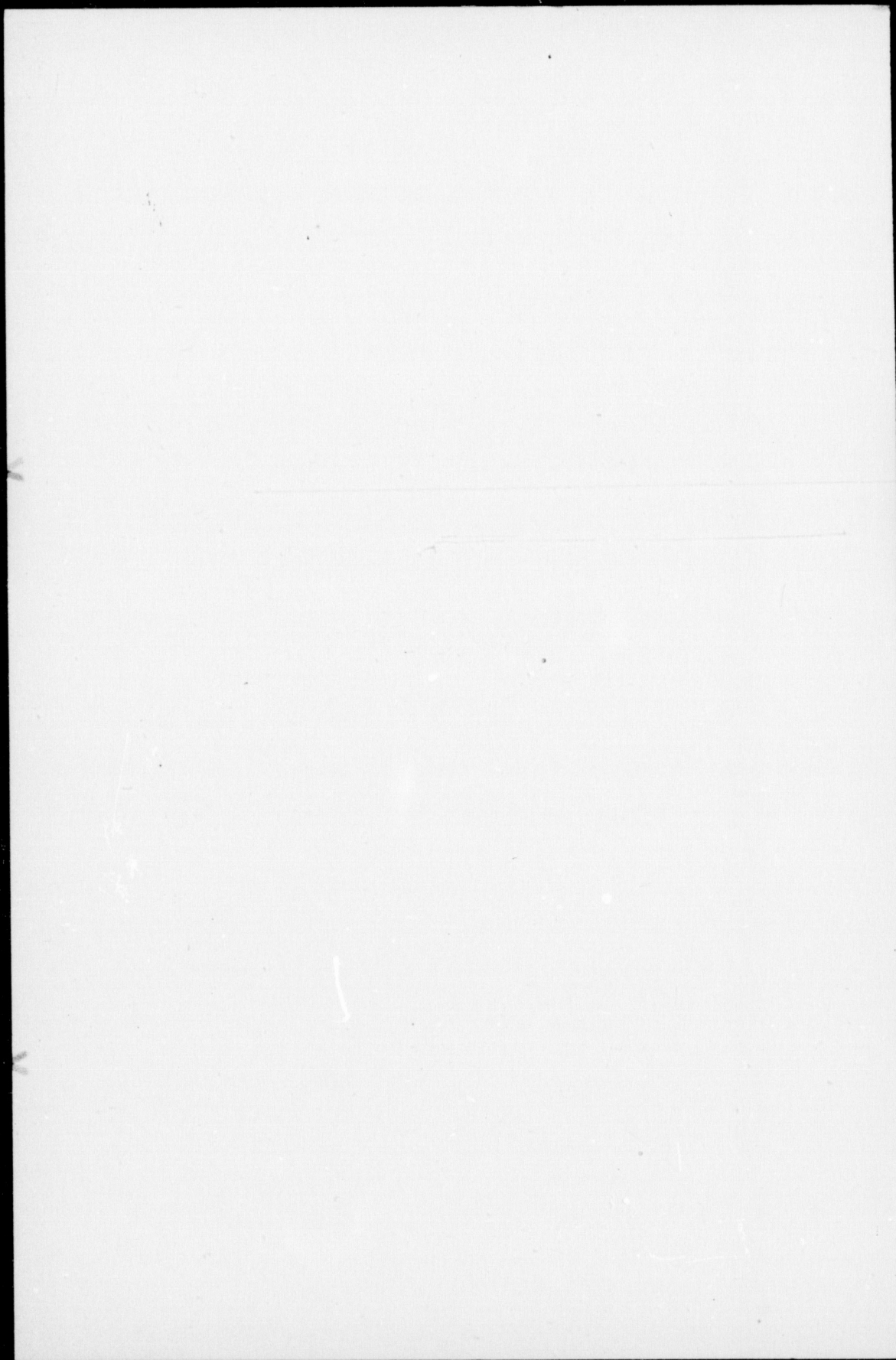
0000000000

EXHIBIT "B"

For deposit only - Pay to the
credit of Marfinco S.A.

PAY TO THE ORDER OF
MANUFACTURER


SEP 23 1941
140042733



81a

82a

Plaintiff's Exhibit 5

(See opposite) 

Septiembre 20 de 1971

Señores
Waroquiers S.A.
Florida 656
B.Aires

Muy Señores míos:

De acuerdo a lo conversado les entrego dos Cheques N. 72 y 73 c/. el First National City Bank of N.York por un total de Dls. 20.000.- para aplicarlos a la compra de Bonos Exteriores Argentinos 1971, para ser entregados en un Banco en N.York.

Segun su deseo estos cheques seran depositados en Perera Co.Inc. de N.York y a cuyo nombre estan extendidos, en garantia de la disponibilidad de fondos para que Vds. puedan cobrar el importe de los Bonos al entregarlos a la Perera Co. Inc., acompañados de una carta mia dirigida a los mismos, autorizando el pago. -

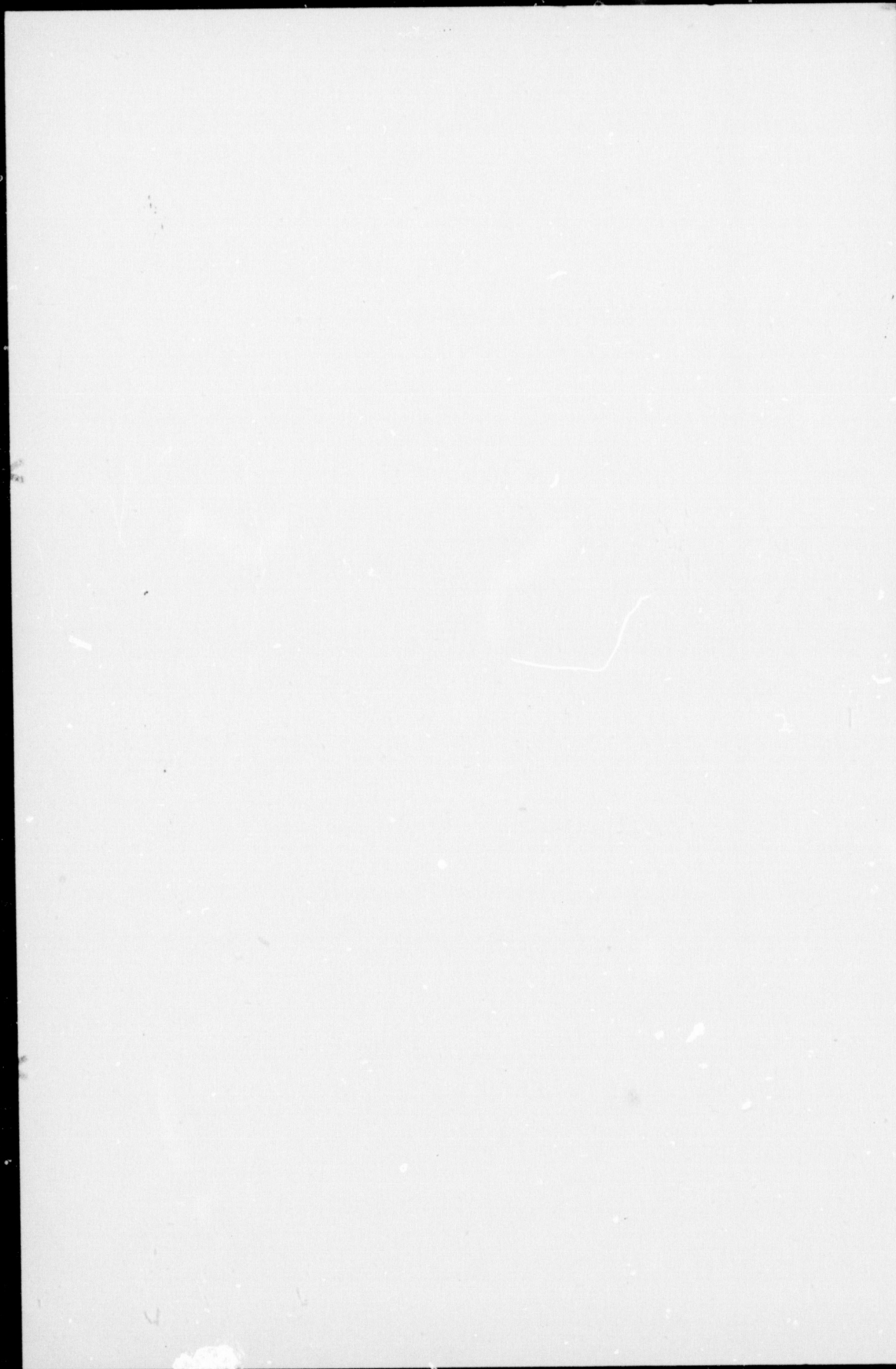
Al enviar Vds. los dos Cheques a Perera Co. los acompañaran con las instrucciones necesarias para el cumplimiento de lo tratado.-

Sin más por el momento, saludo a Vds. muy att.

S. S. S.

José Borrello

EXHIBIT "C"



83a

Plaintiff's Exhibit 5A

(Translation)

September 20, 1971

Waroquiers, S.A.
Florida 656
B. Aires

Dear Sirs:

As we agreed in our conversation, I am sending you two checks Nos. 72 and 73 on the First National City Bank of New York, totaling \$20,000, to be used for the buying of Argentine Foreign Bonds 1971, to be delivered to a New York bank.

According to your request, these checks will be deposited with Perera Company, Inc. of New York in whose name they are drawn, as a guarantee of the availability of funds, so that you can receive the amount of the bonds upon delivering them to Perera Company, Inc. with a letter of mine addressed to them, authorizing the payment.

When you send the two checks to Perera Company you should send them together with the necessary instructions for carrying out what we have discussed.

Without any more for the moment,

Sincerely,

José Borrello

Plaintiff's Exhibit 6A

TRANSLATION

from: SPANISH WB:mms

(Receipt for Registered Airmail)
Ministry of Public Works and Services
Office of the Undersecretary for
Communications

March 30, 1972

Buenos Aires, March 30, 1972

Perera Co., Inc.
29 Broadway St.
New York

Gentlemen:

On September 30th, 1971, by means of two checks, photocopies of which are enclosed, I sent you the amount of US \$20,000.—which amount was to be applied to the payment of 1971 External Bonds once they were delivered to you.

Since the operation will not be carried out please return the US \$20,000.00 to the First National City Bank Hudson St. Branch, New York, to be credited to my account No. 0435-2257.

Awaiting to hear from you, I beg to remain,

Very truly yours,

Jose Borrello

Plaintiff's Exhibit 7A

TRANSLATION

from: SPANISH WB:mms

(Receipt for Registered Airmail)
Ministry of Public Works and Services
Office of the Undersecretary for
Communications

April 18, 1972

Buenos Aires, April 20, 1972

Perera Co, Inc.
29 Broadway
New York, N.Y.

Gentlemen:

I confirm to you my registered letter of March 20th, 1972 which I believe you received.

In it I asked you to deposit in my account No. 0435.2257 with the First National City Bank (Hudson St. Branch) of your city, the US\$20,000.00 which I sent you in two checks dated September 20th, 1971 to cover a transaction in Argentine External Bonds, which was not carried out.

Since up to now I have not heard from you with regard to the transfer of the US \$20,000.00 to the City Bank, I repeat my request asking you to do so promptly since I need to be able to dispose of said money.

Waiting to hear from you, I beg to remain,

Yours very truly,

Jose Borrello

Plaintiff's Exhibit 8A

TRANSLATION

from: SPANISH WB:mms

PERERA COMPANY INC.

29 Broadway

New York, N.Y. 10006

April 27, 1972

Mr. Jose Borrello

Ecuador 1334—4° A.

Buenos Aires, Argentina

Dear Mr. Borrello:

Please pardon our delay in replying to your letter of March 20th.

We have no record of having received the original instructions and would have to know which of our accounts sent the checks for the operation since we only handle funds received from our clients.

You should again get in touch with the client of ours who served you in September to claim the funds. In any event you could also send a photocopy of the back of your two checks.

Without anything else, we beg to remain,

Yours very truly,

S/Signature

Laszlo von Mihaly

Assistant Vice-President

LvM/nra

Plaintiff's Exhibit 9A

TRANSLATION

from: SPANISH WB:mms

Buenos Aires, May 6, 1972

Perera Company Inc.
29 Broadway
New York, N.Y.

Gentlemen:

I reply herewith to your letter of April 20th, 1972.

The two checks for a total amount of US\$20,000.00 received by you through the stock brokers Warroquiers S.A. who acted as agents and demanded from me cash in a New York bank for the purchase of the 1971 External Bonds.

If when the two checks were sent you no information was given you as to how the money was to be applied, I have no knowledge as to this, but since the two checks were to the order of Perera and Co. Inc. I had no cause for concern since you could not dispose of my money without my prior written authorization.

Furthermore you state that you only handle money of clients and desire to know to which of your accounts the two checks were applied, a question which I cannot answer since I do not know.

However, when you received the two checks to your order and cashed them or made disposition of them, you established yourself as depositaries of my money and you cannot evade the responsibility which corresponds thereto.

Plaintiff's Exhibit 9A

For this reason it seems strange to me that you advise me to claim my money from someone who was a mere channel.

In compliance with your request, I am enclosing photographic copy of the back of the two checks 72 and 73.

I hope that I have thereby clarified all questions in your mind and will again ask you to proceed with the return to the City Bank (Hudson St. Branch) of the amount of the two checks since I need to draw upon my money.

Without anything else for the time being and awaiting your kind reply, I beg to remain

Very truly yours,

Jose Borrello

Plaintiff's Exhibit 10A

TRANSLATION

from: SPANISH WB:mms

PERERA COMPANY INC.

29 Broadway

New York, N.Y. 10006

May 10, 1972

Mr. Jose Borrello

Ecuador 1334 4°P.A.

Buenos Aires, Argentina

Dear Sir:

In reply to your letter of the 6th instant we beg to advise you that the two checks were sent to us in a remittance from our former client MARFINCO S. A. for the crediting of its account.

In view of the fact that the "MARFINCO S.A." account was closed out in February 1972, you will have to get in touch directly with the holders of your checks.

Without anything else and always at your service, we beg to remain,

Very truly yours,

Plaintiff's Exhibit 11A

TRANSLATION

from: SPANISH WB:mms

(Receipt for Registered Airmail)
Ministry of Public Works and Services
Office of the Undersecretary for
Communications

June 7, 1972

Buenos Aires, June 8, 1972

Perera Company Inc.
29 Broadway
New York

Gentlemen:

I refer to your letter of May 10th, 1972.

I am greatly surprised by your advice that you credited to the account of Marfinco S.A. the amount of the two checks issued to your order despite the fact that they were endorsed in favor of the Manufacturers Hanover Trust Co.

I have nothing to do with the use which you made of the two checks since you could transfer them to third parties naturally for your account and risk.

Therefore you are the only party to whom I must direct myself in order to claim my money.

Should you continue refusing to repay me the amount of the checks I will be forced to bring an action in court, including damages for the delay.


Hoping that you will reconsider your position and let me know of your decision within two weeks, I beg to remain,

Very truly yours,

Jose Borrello

92a

Plaintiff's Exhibit 12A

(See opposite) 

STATIONERY OF PERERA COMPANY, INC.

June 20, 1972

Sr. Jose Borrello
Ecuador 1334 - 4A
Buenos Aires, Argentina

Dear Sir:

We have just received your letter dated June 8th.

The two checks sent to us for our former client Marfinco S.A. have been received and carry the endorsement "For deposit only - pay to the credit of Marfinco S.A."

Consequently, all ^{in reference} ~~the~~ discussion ~~referred to the~~ application of the funds the correspondents have owed has been paid to you and the holder of your checks, the said Marfinco S.A.

Corresponding →

Our best wishes and salutations to you. Very attentively.

PERERA COMPANY, INC.

Laszlo von Mihaly
Asst. Vice-President

"consequently all discussions in reference to application of the corresponding funds should take place between yourself and the endorser of your checks, i.e. Marfinco S.A."


EXHIBIT "E-6" (TRANSLATION)

ONLY COPY AVAILABLE

93a

94a

Plaintiff's Exhibit 13

(See opposite) 

ACCOUNT OF

FIRST NATIONAL CITY BANK

NEW YORK

ACCOUNT NUMBER

JOSE BORRELLO & OR
JOSEFA BORRELLO
ECUADOR 1334
BUENOS AIRES ARGENTINA

04352257
1039

39



PLEASE NOTIFY US OF ANY CHANGE IN YOUR ADDRESS (SEE REVERSE SIDE)

DEBITS (CHECKS)	CREDITS (DEPOSITS)	DATE	BALANCE
BALANCE BROUGHT FORWARD		9 09 71	20,767.22
	300.00	9 14	21,067.22
	2,621.40	9 20	23,688.62
		9 24	3,688.62
			3,688.62
		10 07	3,388.62
10,000.00 E.O.M. BAL. 300.00	10,000.00		

NO. OF DEBITS 3 NO. OF CREDITS 2 DATE RENDERED 10 07 71 42

LAST AMOUNT ABOVE IS YOUR FINAL BALANCE ON DATE RENDERED

PLEASE INFORM US IMMEDIATELY OF ANY EXCEPTION(S) TAKEN BY YOU, GIVING FULL DETAILS AND YOUR ACCOUNT NUMBER

KEY TO
SYMBOLS

A - CHARGE MEMO

B - CREDIT MEMO (REFER TO ADVICES)

C - CERTIFIED CHECK (ENCLOSED OR OUTSTANDING) L - LIST

D - AUTHORIZED DEBIT

E - AUTHORIZED CREDIT

M - CREDIT MEMO

(REFER TO ADVICES)

N - INDIRECT DRAWING

OD - OVERDRAFT

R - RETURNED ITEM


S - SERVICE CHARGE

E.O.M. BAL. - END
OF MONTH BALANCE

95a

96a

Plaintiff's Exhibit 14

(See opposite) 

September 20th. 1971 -

Letter No 38

Messrs.
PERERA C°. Inc.
Att. Mr. L. Von Mihaly
1 Trinity Place
NEW YORK - N.Y. - USA

FILE

SEP 24 1971

C/A DEPT.

PERERA CO., INC.

RECEIVED
SEP 23 1971
756047

Gentlemen:

We enclose the following checks to be credited to our account with you:

NUMBER	BANK	IDENTIFICATION	AMOUNT
M 2	Marine Midland Grace	I. Bricelj	\$ 100.--
72	City	J. Borrello	\$ 10.000.--
73	"	" "	\$ 10.000.--
737 016 671/72	City	Trav. El Gaucho	\$ 20.--
135 008 142/43	of America	" "	\$ 20.--
131 888 680	" "	" "	\$ 10.--
DG10 178 617/18	American Express	" "	\$ 40.--
BA66 537 482	" "	" "	\$ 10.--
AF76 198 150	" "	" "	\$ 10.--
BA85 485 919	" "	" "	\$ 10.--
BA92 062 814	" "	" "	\$ 10.--
BA94 373 459	" "	" "	\$ 10.--
54079	Merchants National	Cimapi	\$ 2.143,60
- - -	Chemical Bank	Zucchelli	\$ 3.522,67
			\$ 25.906,27
- - -	Chemical Bank	Zucchelli	\$ 7.575,72
			\$ 33.481,99

Luis Manilla

Yours very truly
MARFINCO S.A.

ONLY COPY AVAILABLE

97a

Extract of Plaintiff's Exhibit 15**AGREED ABSTRACT OF EXHIBIT 15—THE LEDGER
PAGES OF PERERA COMPANY, INC.
WITH MARFINCO S.A.**


Date	Marfinco S.A. Credit Balance
September 17, 1971	\$232,035.97
September 23, 1971	\$268,263.71
October 8, 1971	\$ 9,349.76
October 29, 1971	\$185,549.32
November 1, 1971	\$185,549.32
November 3, 1971	\$ 81,696.45
November 9, 1971	\$148,853.76
November 15, 1971	\$ 90,362.56
November 18, 1971	\$ 21,325.57
December 1, 1971	\$138,820.18
December 3, 1971	\$ 27,135.43
December 10, 1971	\$138,829.34
December 17, 1971	\$ 9,615.40
December 31, 1971	\$114,643.58
January 4, 1972	\$ 13,002.67
January 11, 1972	\$ 85,940.00
January 17, 1972	\$ 77,736.77
January 24, 1972	\$116,262.44

Extract of Plaintiff's Exhibit 15

Date	Marfinco S.A. Credit Balance
January 25, 1972	\$ 15,544.10
January 27, 1972	\$ 14,622.93
January 28, 1972	\$ 2,315.93
January 31, 1972	\$ 2,126.93
February 1, 1972	\$ 1,876.93
February 10, 1972	\$ 6,982.43
February 17, 1972—ledger reads “transferred to suspense A/C to meet eventual claims & legal expenses”	—0—

100a

Defendant's Exhibit A

(See opposite) 

PERERA COMPANY, INC.
FOREIGN EXCHANGE
29 BROADWAY
NEW YORK, N. Y. 10006

2609

PAY
TO THE
ORDER OF

Martinez S. A.

March 24 1972 $\frac{1315}{260}$ 10

\$6,982.43

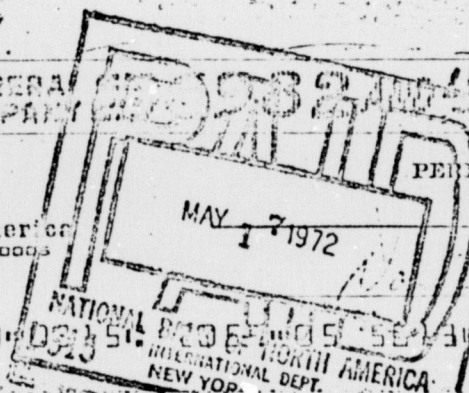
PERERA
COMPANY

10006 N.Y.C. 10006

DOLLARS

National Bank
of North America
INTERNATIONAL DIVISION, NEW YORK, N. Y. 10006

PERERA COMPANY, INC.



00000698243

00000698243

PAY ONLY TO REPUBLIC NATIONAL
BANK OF NEW YORK ONLY TO BE
CREDITED IN ACCOUNT NUMBER

1609811

1-30

1-30

MAY 17 '72 33159

32 11719 JAN 16 72 222222



101a

Defendant's Exhibit B

PERERA COMPANY, INC.

CONDITION SHEET

Account No: Name: MARFINCO S.A.

Advices to be addressed: Marfinco S. A.
Bulevsrd Artigas 2146 Ap. 502
Montevideo, Uruguay

Cable instructions:

- 1.— Whenever funds are revd. from you and we will mention your reference #.
- 2.— Cks. returned to us regardless of the amount.
- 3.— Whenever funds are recvd, for your acct.

Cable address: BANCA—Montevideo

Neutral Envelopes: Yes

Special Code: Test—Key #550—YOUR CODE ADDRESS
"COPERCO NEWYORK"

Statements Required: *Petersen IV*

Drafts to be Returned

Charges:

Instructions: Phone number: 392.8923 392.8999 392.9272
Telex number 012.2156

Other Known USA Correspondents:

Remarks: AUTHORIZED SIGNATURES:

MAURICIO WAROQUIERS

ROBERTO CANCEL

RAUL CLERISSI

Luis Mansilla

Luis Young.

Fernando Lejeune/They will sign singly

Recommended by: Penco

Date Account Opened: Jun 21, 1971

Opinion, Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civil 5368

[SAME TITLE]

A p p e a r a n c e s :

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Of Counsel

Opinion, Findings of Fact and Conclusions of Law

LEVET, D.J.

This is a diversity action brought by plaintiff, Jose Borrello ("Borrello"), a citizen of the Republic of Argentina, residing in the City of Buenos Aires, Argentina, against defendant, Perera Company, Inc. ("Perera"), a New York corporation.

This action is brought by Borrello, the maker of two checks, against Perera, the payee, who received these checks by delivery from a third party, Marfinco, S.A. ("Marfinco") and deposited the funds in its corporate account but internally credited the sum to an account maintained with it by the third party, Marfinco. From the facts shown at the trial the parties were unable to determine who placed the following typed legend on the back of the checks: "For deposit only—Pay to the credit of Marfinco S.A."

After hearing the evidence presented by the parties, examining the exhibits, the pleadings, the briefs and the proposed Findings of Fact and Conclusions of Law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff is a resident of the City of Buenos Aires, Argentina. (Ex. 2, Q & A Nos. 1, 2.)¹

2. Defendant is a New York corporation organized under the New York Stock Corporation Law (now Business Cor-

¹ References preceded by "Ex." are to the exhibits admitted into evidence during the trial; references preceded by "Q & A" are to the questions and answers contained in plaintiff's deposition, admitted in evidence as Ex. 1 and 2; references preceded by "Tr." are to pages of the stenographic transcript of the trial.

Opinion, Findings of Fact and Conclusions of Law

poration Law) having its main place of business in New York County. (Tr. 3.)

3. This court has jurisdiction of the subject matter and of the parties in this action.

4. On September 20, 1971 plaintiff delivered to Waroquiers, S.A., a broker in Buenos Aires, two checks with a written instruction describing the purpose for the delivery of the checks and the procedure to be followed. (Ex. 2, Q & A Nos. 10-14, 23-24; Exs. 3, 4, 5A.)

5. The two checks delivered by plaintiff to Waroquiers were each dated September 20, 1971, each drawn on plaintiff's bank account maintained at the First National City Bank, New York, New York, each in the amount of \$10,000 and each payable to the order of Perera as payee. (Exs. 3, 4.)

6. The checks were made payable to Perera at the request of the broker, Waroquiers, which was instructed by plaintiff to deliver the checks to Perera with instructions to hold the funds pending plaintiff's authorization to make payment against the delivery of Argentine external bonds to plaintiff. (Ex. 5A.)

7. Marfinco was a company engaged in the foreign exchange business and which had engaged in a course of business with Perera and maintained an account with Perera in connection with various foreign currency exchange transactions. (Ex. B; Tr. 16, 19, 29.)

Opinion, Findings of Fact and Conclusions of Law

8. Subsequently, in some manner not disclosed, the two checks came into the possession of Marfinco. On September 20, 1971 Marfinco sent the two checks (Exhibits 3 and 4) with a group of other checks to Perera with a letter (Ex. 14) stating: "We enclose the following checks to be credited to our account with you:" One vonMihaly, a vice president of defendant corporation, testified that in September 1971 Marfinco was a customer of Perera and maintained an account with Perera. (Tr. 16, 19, 20.)

9. At some time (apparently before Marfinco mailed the checks to Perera (see letter Ex. 12)) some person typed on the back of each check (Exs. 3 and 4) the legend: "For deposit only—Pay to the credit of Marfinco, S.A." No evidence of authority for any such transfer was ever submitted to this court.

10. Some employee or officer, concededly acting for Perera, endorsed the two checks: "Pay to the order of Manufacturers Hanover Trust Company, New York, New York, for credit to the account of the First National Bank of Fleischmanns, Fleischmanns, N.Y." and deposited both checks in the Manufacturers Bank to the credit of defendant's account with the Fleischmanns bank. That amount was then credited on defendant's internal books to the account of Marfinco. (Exs. 3, 4; Tr. 24, 25, 28, 29.)

11. Perera then permitted Marfinco to use a portion of these funds to pay for certain orders. (Tr. 34.)

12. Marfinco's account with defendant was "closed" on February 17, 1972 by a transfer to a Perera suspense ac-

Opinion, Findings of Fact and Conclusions of Law

count of the then balance of \$6,982.43. Defendant issued a check in favor of Marfinco for said sum dated March 24, 1972 and the check was paid by defendant's bank on May 17, 1972. (Exs. 15, B.)

13. Plaintiff demanded that defendant return the \$20,000 by letter dated March 30, 1972 and defendant rejected the claim by letter dated May 10, 1972. (Exs. 6A, 10A.)

14. Prior to the transaction involved here, plaintiff had never had any business dealings with Marfinco or Perera. Neither did plaintiff have any discussions with any officer or employee of Waroquiers with regard to the firm of Marfinco. (Ex. 2, Q & A Nos. 40-44.)

15. Perera made no attempt to inquire as to Marfinco's title to the checks or the reason for Marfinco's possession of checks payable to the order of Perera. (Tr. 23-28.) Plaintiff was not indebted to defendant and there had been no prior business transactions between them. (Ex. 2, Q & A No. 20; Tr. 31, 32.)

16. Defendant made no effort to contact plaintiff or make any inquiry of plaintiff as to the purpose for which the checks were issued when it received and deposited the checks, or when it permitted the withdrawal of funds by Marfinco, or at any time between the deposit and March 30, 1972, when plaintiff demanded return of his funds. (Tr. 31-32.)

17. Thus, Perera, after acceding to Marfinco's conversion of the checks to defendant, compounded the theft by

Opinion, Findings of Fact and Conclusions of Law

itself converting the funds to Perera without regard to plaintiff's rights. Clearly, Marfinco had no right to transfer any interest in the checks (which were payable to Perera) and Perera had no right to credit such funds to Marfinco nor to convert such funds to itself. This is a clear-cut case of plain chicanery upon the part of defendant.

18. Plaintiff is entitled to judgment for \$20,000, together with costs, and to interest at the rate of 6% to run from September 23, 1971.

DISCUSSION

Plaintiff, Jose Borrello, is an Argentine citizen who is suing defendant, Perera Company, Inc., a New York business corporation, for money it had received from the proceeds of two checks each in the amount of \$10,000, drawn on September 20, 1971 by Borello to the order of Perera. The action may also be described as an action for conversion of the proceeds of the checks brought by the drawer, Borello, against the named payee, Perera.

Through diversity the case was properly brought in this court. Title 28 USC § 1332(a).

On September 20, 1971 plaintiff went to his stock broker in Buenos Aires, a company known as Waroquiers, S.A. He brought with him two checks drawn on plaintiff's New York bank account at the First National City Bank, each in the amount of \$10,000. Borello requested the broker to arrange to purchase for him \$20,000 worth of Argentine Government External Bonds. He told an employee of Waroquiers in charge of the matter that in order to con-

Opinion, Findings of Fact and Conclusions of Law

summate that transaction he had brought those checks. Waroquiers' employee told Borello that in order to consummate the transaction the funds should be deposited with Perera in New York, represented to be a company which would be instructed to consummate the purchase upon appropriate instructions. In the presence of plaintiff, the Waroquiers' employee caused the name "Perera Company, Inc." to be typed in as the name of the payee in the blank space of each check. Plaintiff Borello then delivered a letter of instruction (Ex. 5A) to Waroquiers, stating that the checks should be delivered to Perera as a guarantee of the availability of the funds and that the funds would remain deposited with Perera until further instructions. (See Findings of Fact 4-6.)

It is undisputed that Borrello had had no prior dealings with Perera and that Borrello had no indebtedness to Perera. (Finding of Fact 14.)

Perera was incorporated under the New York State Business Corporation Law to deal in foreign currency, stocks and coins. (Tr. 3.) It carried accounts for foreign exchange companies and foreign exchange stock brokers. (Tr. 16.)

Plaintiff instructed his stock broker to deliver the two checks to Perera together with instructions that Perera hold the proceeds of the checks pending delivery to Perera of \$20,000 worth of Argentine External Bonds and for Perera to cause the bonds to be delivered to plaintiff and the \$20,000 to be released to the broker, Waroquiers, upon receipt by Perera of a letter from plaintiff authorizing such disbursement to the broker. (Ex. 5A.) The broker delivered no direct instructions to Perera. (Tr. 49.) Instead, the broker apparently delivered the checks to its affiliate,

Opinion, Findings of Fact and Conclusions of Law

Marfinco, S.A., of Montevideo, Uruguay, and said Marfinco then transmitted the checks to Perera. (Ex. 14.) Perera's receiving stamp on the Marfinco letter shows that it was received by Perera on September 23, 1971 and that the letter covering a transmittal of fifteen checks to Perera included plaintiff's two checks totaling \$20,000. The letter instructed Perera to credit all fifteen checks to the Marfinco account with Perera. (Ex. 14.)

Plaintiff's stock broker, Waroquiers, advised plaintiff that consummation of the bond purchase transaction would be delayed and the period of delay was four months. In fact, the bond purchase was never made and no bonds were delivered. (Ex. 2, cross-interrogatories Nos. 10-13.)

Obviously, Marfinco had no right to direct Perera to credit \$20,000 to Marfinco's credit on the basis of the checks. Nevertheless, Perera endorsed the checks with its stamped endorsement and deposited the \$20,000 in its bank account and that amount was then credited on Perera's internal books to the account of Marfinco. (Exs. 3, 4; Tr. 24, 25, 28-29.)

Clearly, defendant Perera had no right to give Marfinco credit for the two checks. Defendant was a business corporation engaged as heretofore stated. There was no basis for a conclusion that they were gifts.

Defendant made no attempt to inquire as to Marfinco's title to the checks or the reason for Marfinco's possession of the checks payable to the order of defendant. (Tr. 23-28.) Moreover, defendant made no effort to contact plaintiff or make any inquiry of plaintiff as to the purpose for which the checks were issued when it received and deposited the checks, or when it permitted the withdrawal of funds

Opinion, Findings of Fact and Conclusions of Law

by Marfinco, or at any time between the deposit and March 30, 1972, when plaintiff demanded the return of his funds. (Tr. 31-32.)

Defendant permitted Marfinco to use a portion of these funds which were credited to Marfinco's account to pay for its orders, all without any authorization from plaintiff. Then on February 17, 1972 defendant "closed" Marfinco's account by transferring the balance of \$6,982.43 to a suspense account. Finally, on March 24, 1972 defendant issued a check in favor of Marfinco for this balance. (Findings of Fact 11, 12.)

Although defendant's manipulations with respect to the checks were somewhat involved, I must say that it was a clear-cut conversion of \$20,000 of plaintiff's funds.

Defendant has presented a tortuous and specious theory in an attempt to create a defense to its acts. I see no merit in any of its contentions.

Of course, plaintiff gave no direct instructions to defendant. The instructions were given to Waroquiers which apparently, without authorization, turned the checks over to Marfinco which never acquired any right thereto. Marfinco's authorization could not be a basis for defendant's conversion.

Under the laws of the State of New York a payee may not obtain rights to collect a check to a third party without first making inquiry of the maker. *Federal Insurance Company v. Groveland State Bank*, 44 A.D. 2d 182 (4th Dept. 1974); *Arrow Builders Supply Corp. v. Royal National Bank*, 21 N.Y. 2d 428 (1968); *Sims v. U. S. Trust Company*, 103 N.Y. 472 (1886).

Perera was required to inquire as to the purposes for the issuance of the checks. *Fidelity & Casualty Co. of N.Y.*

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v. Hellenic Bank Trust Co., 181 Misc. 40, 45 N.Y.S. 2d 43 (1943), aff'd mem. 181 Misc. 44, 47 N.Y.S. 2d 295 (App. Term, 1st Dept. 1943).

None of the defenses set out by defendant has any merit.

Under the circumstances here, there was no contributory negligence by plaintiff. Plaintiff delivered the two checks to his stock broker with specific instructions. (Ex. 5A.) This involved no negligence on his part and, even if it were negligence, it was not the proximate cause of the loss. *Matteawan Manufacturing Co. v. Chemical Bank & Trust Co.*, 244 App. Div. 404, 279 N.Y.Supp. 495 (1st Dept. 1935), aff'd 272 N.Y. 411 (1936); *Fidelity & Casualty Co. of N.Y. v. Hellenic Bank Trust Co.*, supra. This doctrine does not apply to the present case. *Bunge Corp. v. Manufacturers Hanover Trust Co.*, 31 N.Y. 2d 223 (1972).

Defendant here was not an innocent person. *Federal Insurance Company v. Groveland State Bank*, supra; *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N.Y. 281 (1900).

The defense of equitable estoppel has not been maintained.

Moreover, the defense of alleged failure to inspect the checks returned from the bank is no defense to this defendant. This principle applies only between depositors and the banks. *Wagner Trading Co. v. Battery Park National Bank*, 228 N.Y. 37 (1920); *Federal Insurance Company v. Groveland State Bank*, supra, 44 A.D. 2d 182, 354 N.Y.S. 2d 220 (4th Dept. 1974).

The Uniform Commercial Code, Section 4-406, sets out the duty to examine returned checks and that section specifically refers only to the relationship between a bank and

Opinion, Findings of Fact and Conclusions of Law

its customer. There was no such relationship between plaintiff and defendant.

The negligence provisions contained in the Uniform Commercial Code also are not applicable to this situation. Section 3-406 specifically refers to negligence which "substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature." The typed legend on the back of the two checks was neither a material alteration nor an unauthorized signature.

The defendant has sustained no valid defense.

INTEREST

The law governing the date for the computation of pre-judgment interest is set forth in Civil Practice Law and Rules § 5001(b), as follows: "Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred."

In the instant case, defendant had the use of the \$20,000 since September 23, 1971. Defendant's deposit of the funds into its own account, without inquiry of plaintiff as to the purpose for the issuance of the checks, and defendant's bookkeeping entries making the funds available to a third party, gave rise to the instant action.

In *Menendez v. Faber, Coe and Gregg, Inc.*, 345 F. Supp. 527 (S.D.N.Y. 1972) the court interpreted CPLR § 5001 as follows: "The rule is based upon the premise that the party to whom the money is owed has been deprived of the use of the funds and can be made whole only by the award of interest. Conversely, the party owing the money

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has had the use of the funds he was obligated to pay, and should be required to pay compensation by way of interest therefor." (345 F. Supp. at 546.)

In *Collier v. Granger*, 258 F.Supp. 717 (S.D.N.Y. 1966), the court, in a stock fraud case, held: " * * * pre-verdict interest was due from the date of the fraudulent sale, thus implying that though the fraud was ???? a continuing nature, the cause of action existed at the earlier time. In any event, the words 'earliest ascertainable date' convince us that the broad purposes sought to be accomplished by § 5001 are best served by a flexible, common sense approach to the question of when the cause of action initially arose." (258 F.Supp. at 719)

In the instant case, defendant misapplied the funds as soon as it received them and deposited them to its own account without holding them for the benefit of plaintiff. The wrong took place at that time and payment could then have been demanded by plaintiff.

Here, plaintiff, as a matter of law, is entitled to interest on the value of property converted, \$20,000, computed from September 23, 1971, the date on which defendant converted plaintiff's property by crediting the proceeds of the two checks to Marfinco's account.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this action. 28 USC § 1332(a).
2. The substantive law of New York governs the rights of the parties.

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3. The designation of Perera as payee gave it notice that the checks were transferring to it funds of plaintiff; by collecting the checks and accepting and depositing the funds, Perera received plaintiff's property and was obliged to retain the funds subject to plaintiff's direction. *Federal Insurance Company v. Groveland State Bank*, supra; *Arrow Builders Supply Corp. v. Royal National Bank*, supra; *Sims v. U. S. Trust Company*, supra.

4. Upon receipt of the funds and prior to any disbursements, it was the duty of defendant to make inquiry of the plaintiff as to the purpose for delivery of the funds. Since an inquiry would have disclosed immediately the purposes for which the checks were issued, defendant is chargeable with knowledge of the facts. *Munn v. Boasberg*, 292 N.Y. 5 (1944); *Fidelity & Casualty Co. of N.Y. v. Hellenic Bank Trust Co.*, supra.

5. Defendant has failed to prove by a fair preponderance of the credible evidence that plaintiff was negligent or that, even if negligent, any of plaintiff's acts was the proximate cause of the loss. *Matteawan Manufacturing Co. v. Chemical Bank & Trust Co.*, supra; *Fidelity & Casualty Co. of N.Y. v. Hellenic Bank Trust Co.*, supra; *Federal Insurance Company v. Groveland State Bank*, supra.

6. The doctrine of equitable estoppel is not available to the payee in the case of delivery to it by a thief of an ordinary check requiring the endorsement of the payee; defendant's failure to take precautions and failure to make inquiry of plaintiff before disbursing the funds prevent defendant from being considered as a commercially "in-

Opinion, Findings of Fact and Conclusions of Law

nocent" party. *Bunge Corp. v. Manufacturers Hanover Trust Co.*, supra; *Rochester & Charlotte Turnpike Road Co. v. Paviour*, supra.

7. Defendant has failed to prove by a fair preponderance of the credible evidence that plaintiff should be estopped from reccevering his funds.

8. Plaintiff owed no duty to defendant to examine the checks and endorsements received by him from the First National City Bank; the duty of inspection and examination of returned checks is owed only by those in a bank-customer contractual relationship. *Wagner Trading Co. v. Battery Park National Bank*, supra; *Federal Insurance Company v. Groveland State Bank*, supra.

9. Defendant's failure to make inquiry of plaintiff prior to disbursing the funds to the third party prevents it from relying on principles of estoppel. *Federal Savings & Loan Insurance Corp. v. Kearney Trust Co.*, 151 F. 2d 720 (8th Cir. 1945).

10. Plaintiff Borrello is entitled to judgment against defendant Perera for \$20,000 plus interest from September 23, 1971, according to law, together with costs.

Settle judgment promptly upon notice pursuant hereto.

Dated: New York, N.Y.

September 20, 1974.

/s/ RICHARD H. LEVET
United States District Judge

Judgment Appealed From

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5368 (R.H.L.)

#74,791

JOSE BORRELLO,

Plaintiff,

—against—

PERERA COMPANY, INC.,

Defendant.

This action having come on for trial before this Court, Hon. Richard H. Levet, District Judge, presiding, without a jury, and the issues having been duly tried and an opinion, findings of fact and conclusions of law having been duly rendered and filed, it is

ORDERED AND ADJUDGED, that the plaintiff, Jose Borrello, recover of the defendant, Perera Company, Inc., the sum of \$20,000.00, with interest thereon from September 23, 1971, at the rate of six (6%) per cent per annum, amounting to \$3,629.57, making in all the sum of \$23,629.57, together with plaintiff's costs as taxed by the Clerk, and that plaintiff have execution therefor.

118a

Judgment Appealed From

Dated at New York, New York
October 2, 1974.

RICHARD H. LEVET
United States District Judge

Defendant's Address:

29 Broadway
New York, New York 10006

Attorneys for Defendant:

Greenwald, Kovner & Goldsmith
521 Fifth Avenue
New York, N.Y. 10017

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5368 (R.H.L.)

JOSE BORRELLO,

Plaintiff,

—against—

PERERA COMPANY, INC.,

Defendant.

S I R S :

PLEASE TAKE NOTICE that defendant Perera Company, Inc., above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 7th day of October, 1974.

120a

Notice of Appeal

Dated: New York, N.Y.
November 4, 1974

Yours, etc.

GREENWALD, KOVNER & GOLDSMITH
Attorneys for Defendant

By HARRY LITWIN
Harry Litwin, A Partner
521 Fifth Avenue
New York, New York 10017
212/687-6600

To:

CLERK OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

MESSRS. FRANK & FREDERICKS
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New York, New York 10017

Copy Received JAN 23. 1975

Frank & Frederick

by Stephen W. Piller

Trial Counsel

for Plaintiff - Appellee